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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
FRANK BAILEY, Defendant-Appellant.	)	HON. L. SHELDON BROWN, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An indictment was returned against the defendant charging him with the offenses of armed robbery and aggravated battery. After initially entering a plea of not guilty to the indictment, the defendant withdrew his plea and entered a general plea of guilty. The trial court heard testimony stipulated to between the People, and the defendant and his counsel, and sentenced the defendant to a term of one to three years in the penitentiary.

The Public Defender of Cook County, who was appointed to represent the defendant both at trial and on this appeal, has filed a petition in this Court for leave to withdraw as appellate counsel, on the grounds that an appeal would be without merit and could not possibly be successful. Pursuant to the requirements of Anders v. California, 386 U.S. 738, the Public Defender has also filed a brief in support of the petition, raising the one issue which, after a review of the common law record and the report of proceedings in this case, was believed might conceivably serve as the basis of an appeal: "Whether the trial court fully admonished the defendant as to the significance and consequences of his change of plea from not guilty to guilty."

This Court received a notice from the defendant stating that he had received a copy of the Public Defender's petition and brief, and that there were grounds to support the appeal other than that suggested

by the Public Defender. Defendant requested that this Court appoint another attorney to represent him on appeal. This Court allowed defendant additional time within which to file any points which he believed would support the appeal, and he thereafter filed a list of five points, reading:

> "1. The trial judge was familiar with past criminal offenses committed by me, before trial date of April 8, 1968, and before plea of guilty or finding of guilty was ever made.
> "2. I requested a change of venue on aforesaid trial date, which was denied, grounds for change of venue were not even heard.
> "3. I had mace sprayed upon me in the courtroom, in presence of the court, for refusal to agree to a continuance. I tried to get the statement ready for the trial entered into the records and was drug (sic) from the presence of the bench.
> "4. I never saw my counsel until my court dates, and only for a moment, or else in the courtroom. Therefore, I could not have a written motion for a change of venue submitted.
> "5. I don't feel my trial was just and impartial. That was the reason for my request for substitution of Judges."

It appears from the commonlaw record and the report of proceedings in this case that the events charged in the indictment occurred on September 9, 1967 and that defendant was arrested that same day. The indictment was returned on September 14, 1967, defendant was arraigned on September 20th, and the case was assigned to Judge Delaney for trial. The case was continued twice by Judge Delaney, to October 26th and to November 29th. On November 29th, defendant's [first] motion for a substitution of judges was allowed and the matter was reassigned to Judge Brown and set for hearing on December 13th. The matter was then continued by Judge Brown from December 13th to December 21st, from December 21st to February 15, 1968, and from February 15th to April 8th.

On April 8, 1968, the case was called for trial and the People answered "ready." Defendant appeared with his counsel and requested that the matter be continued, for the reason that defendant's father

was in the process of raising enough money for defendant's bond, so that defendant could be free to locate witnesses in his behalf. The trial court stated that the case was ready for trial, refused to grant defendant's request for the continuance and inquired of defendant whether he desired a bench or a jury trial.

At that point defense counsel requested leave of court to move orally for a change of venue. The People objected, and the trial court denied the motion and further denied defendant leave for time to file a written motion for change of venue. The court stated that it did not wish to hear the grounds of the motion and that a written motion should have been prepared prior thereto because the case was ready for trial that day, to which defense counsel replied, "There was no reason to file one or ask for one before this morning, Your Honor." The court then called for a jury and a short recess was taken.

The report of proceedings then continues with the following colloquy between the defense attorney, the court and the defendant, which directly bears on the issue raised by the Public Defender, whether the trial court fully admonished the defendant as to the consequences of a change of plea:

> "MR. ABRAMS (defense attorney): Your Honor, in this matter, Indictment No. 67-3080, there has been a conference between Your Honor and myself and the State's Attorney, after which I conferred with the defendant, Frank Bailey. After that Mr. Bailey had a chance to talk to his mother for a while in my presence.
>
> At this time Mr. Bailey informs me now with respect to Indictment 67-3080 he wishes to withdraw his previously entered plea of not guilty and to plead generally to the Indictment.
>
> "THE COURT: Frank Bailey, do you know what a jury trial is?
>
> "THE DEFENDANT: Yes, sir.

"THE COURT: And you realize that when you withdraw your plea of not guilty and enter a plea of guilty that you automatically waive your right to a trial by jury?

"THE DEFENDANT: Yes, sir.

"THE COURT: Now, on your plea of guilty generally to the Indictment in this case I could sentence you to the penitentiary for a term of not less than one year and any number of years thereafter.
Now, knowing that, do you still wish to plead guilty?

"THE DEFENDANT: Yes, sir.

"THE COURT: All right."

A plea of guilty may be accepted in open court when the court finds that the defendant understands the nature of the charges against him and the consequences of his plea, and, understanding that, pleads guilty. Sup. Ct. R. 401(b); Ill. Rev. Stat. 1967, Chap. 100A, Para. 401(b). Defense counsel informed the trial court that he had a conference with the defendant and that the defendant wished to change his plea to guilty. The trial court then informed the defendant of his right to a trial by jury, of his waiver of that right by entering a plea of guilty, and of the possible sentence he might receive upon a plea of guilty. Defendant, 22 years of age at the time of the proceedings, appeared to understand the matters explained by the trial court, and in fact stated that he did understand. Defendant knowingly waived his right to a jury trial upon entry of his plea of guilty, and the trial court fully admonished him as to the consequences of his plea of guilty to the indictment. People v. Outten, 22 Ill. 2d 146.

With regard to the five points raised by defendant, he first contends that the trial court was familiar with his past criminal offenses, prior to his plea of guilty to the indictment. The record does not support this claim. On the contrary, the only evidence in

the record relating to the trial court's knowledge of defendant's past criminal record is that which was brought out at the hearing in aggravation and mitigation. If the defendant had knowledge of facts not appearing of record, such as he claims, he had ample time and opportunity before the date set for trial to bring such matters to the attention of the trial judge by a written motion.

The second point raised by the defendant relates to the denial of his motion for a change of venue and the trial court's refusal to hear the grounds for the motion. Whether this was a motion for change of venue, made under Section 18 of the Venue Act, or for the substitution of judges, made under Section 114-5 of the Criminal Code, is difficult to determine: defendant, under his points two and four, refers to the motion as a motion for a change of venue, whereas under his point five he refers to the motion as one for the substitution of judges. (See Ill. Rev. Stat. 1967, Chap. 38, Para. 114-5, & Chap. 146, Para. 18.) Nevertheless, both sections must be read and construed together when dealing with either one. People v. Bills, 84 Ill. App. 2d 329, 335.

Defendant failed to comply with the requirements of either statute inasmuch as the motion made by defense counsel was not in writing and verified or supported by affidavit. (See Ill. Rev. Stat. 1967, Chap. 38, Para. 114-5, & Chap. 146, Para. 20.) Defendant already had one substitution from Judge Delaney. The case had been pending seven months, almost five months before the trial judge, and was ready for trial on the day the oral motion was made. The trial court did not commit error in refusing to allow defendant's oral motion for a change of venue, nor did he commit error in refusing to allow defendant time within which to prepare a written motion. People v. West, 80 Ill. App. 2d 59, 63.

Defendant, under point three, states that he was sprayed with mace and was dragged from the courtroom "for refusal to agree to a continuance." As with point one, there is no evidence in the record to support this claim.

Under point four defendant contends that he was unable to submit a written motion for change of venue, for the reason that he did not see his trial counsel until his "court dates." The term "court dates" used by the defendant indicates that he saw his counsel at times other than on April 8th. Furthermore, this contention is negated by defense counsel's statement to the trial judge that there was "no reason to file [a written motion for a change of venue] or ask for one before [April 8th], Your Honor."

Defendant's fifth point has been partially dealt with above in connection with the trial court's refusal to allow the motion for change of venue. Defendant further contends under this point that he did not receive a fair and impartial trial. Since no trial was in fact had in this matter, we will assume that defendant, by the use of the term "trial," is referring to the proceedings had in open court on April 8th which led to the plea of guilty, and that he was not treated fairly in those proceedings.

The fact which precipitated the oral motion for the change of venue was the trial court's refusal to allow the defendant a continuance. Whether a motion for a continuance will be allowed rests within the sound discretion of the trial court. Ill. Rev. Stat. 1967, Chap. 38, Para. 114-4(e); People v. Griswold, 100 Ill. App. 2d 436, 440. The reasons given by the defendant for his request for a continuance were that his father, who had been unemployed for a time, had secured employment and was attempting to raise enough money for defendant's bail, so that defendant could be free to search for witnesses in his behalf; defendant also told the court that his cousin

had been searching for witnesses, but that he had been drafted into the U. S. Army and was no longer available. Defendant's counsel then stated to the court that he questioned the defendant concerning the availability of witnesses, but that defendant was able to give him mostly only the first names of persons and no addresses.

In light of these circumstances and the fact that there had been six continuances of the trial of this matter, extending over seven months, we are of the opinion that the trial judge did not abuse his discretion in denying the motion for the continuance, and that defendant was not treated unfairly in that regard.

The Public Defender is granted leave to withdraw as counsel for defendant on appeal. The judgment is affirmed.

PETITION ALLOWED,
JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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52711

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
ALEXANDER HERRON, Defendant-Appellant.	COOK COUNTY.
	HON. GORDON NASH, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of automobile theft and criminal trespass to a vehicle, and was sentenced to a term of one year to four years in the penitentiary. On appeal he contends that he was not proved guilty beyond a reasonable doubt, in that the People failed to prove he had exclusive possession of the automobile and that the complaining witness' account of the disappearance of the vehicle is improbable and in part self-contradictory.

Napolean Bishop testified that on April 2, 1967 he drove his 1967 Chrysler automobile into a car-wash near Michigan Avenue and Garfield Boulevard in Chicago. The witness testified that the car-wash employees were busy and that he decided to leave because he was to meet his wife a short while later. At the time, the defendant was engaged in conversation with another man nearby.

Bishop and the defendant then engaged in conversation and the defendant stated to him, "You look like a working man," to which Bishop answered in the affirmative. Defendant then gave Bishop a card, which was admitted into evidence at trial, on which he had written his name and address, and asked Bishop to find him a job. The conversation continued and defendant told Bishop he had returned from Viet Nam where he had been wounded. Bishop stated that he "felt sorry" for the defendant and invited him into his automobile where they continued their conversation.

The witness further testified that being out of cigarettes he left the automobile for a period of five or six minutes to purchase cigarettes. He testified that when he left the defendant remained in the automobile and the key was in the ignition. Upon Bishop's return, both the defendant and the automobile were gone, and a person in the car-wash told Bishop, "Your friend drove off in your car." The automobile was found by the police on the west side of the city two days later. Several items of personal property which had been in the vehicle were missing.

Police Detective Roy Olson testified that the Bishop automobile was found on the evening of April 3, 1967, abandoned at 230 South Wolcott Avenue in Chicago; that the defendant was located by means of the card given to Bishop and that when defendant was confronted with Bishop at police headquarters, he denied knowing him or anything about the automobile.

Defendant testified in his own behalf and stated that he met Bishop on the day in question, a Sunday, when the latter approached him and inquired of him if he knew where to purchase liquor before hours and that after purchasing liquor, the two men entered an alley where they engaged in conversation and consumed the liquor. Defendant testified that during the conversation, Bishop, who was attired in coveralls, made the comment that he was dressed like a tramp, but pointed to his Chrysler automobile parked nearby. The two men went to the automobile and continued their conversation for a short while, whereupon Bishop went to purchase cigarettes. Defendant testified that he then left the scene and went to the west side of the city by public conveyance.

The defendant denied the theft of the automobile. He also testified that the reason he denied knowing Bishop when confronted with him at the police headquarters was "because I was so sure that Mr. Bishop, when he came to the police station, wouldn't stand there and say I took his car."

Defendant's contention that the People failed to prove him guilty beyond a reasonable doubt is unavailing. He first maintains that the evidence at best shows his presence in or near the Bishop automobile, and not his exclusive possession of it.

Napolean Bishop testified that he had invited the defendant to be seated in his automobile while the two men engaged in conversation. When the witness discovered he was out of cigarettes he left the automobile with the key in the ignition; the defendant remained in the automobile. Bishop was away from the automobile for a period of five to six minutes, and when he returned, both the defendant and the automobile were gone. It was at this point that Bishop was informed by the person in the car-wash that, "Your friend drove off in your car." The People's evidence, although in part circumstantial, clearly shows that the defendant was in the exclusive possession of the automobile and that he drove it away without Bishop's permission. People v. Pendleton, 75 Ill. App. 2d 314.

Defendant argues that the statement made by the person in the car-wash, that Bishop's friend drove off in the automobile, is hearsay and therefore inadmissible. No objection was made to the admission of that testimony when it was given by Bishop on direct examination. Further, defendant went into more detail concerning the statement when he asked Bishop four questions on cross-examination with respect thereto. The matter has been waived. People v. Voleta, 57 Ill. App. 2d 279.

Defendant also argues that the testimony of Bishop is improbable

and in part self-contradictory. He states that it is contrary to human experience that one who is about to steal something belonging to another should give that other person his name and address, and further that Bishop testified, on the one hand, that he did not have time to have his automobile washed, yet, later testified that someone in the car-wash observed the defendant drive the automobile away.

Bishop testified that the defendant, when the two first met, asked Bishop to find him a job and gave Bishop a card with his name and address on it. He further testified that defendant told him he had returned from Viet Nam where he was wounded and that the witness "felt sorry" for the defendant. Further, there is no evidence, direct or circumstantial, that Bishop drove away from the car-wash after he initially decided to leave, so that the people in the car-wash would no longer be able to observe his automobile. These were matters of weight and credibility for the determination by the trier of fact, and we find no reason to overturn that determination.

The cases cited by the defendant are distinguishable on their facts from the case at bar. See People v. Davis, 69 Ill. App. 2d 120; People v. Kidd, 410 Ill. 271; People v. DiVito, 66 Ill. App. 2d 282.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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NO. 68-39

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CANNON CONSTRUCTION CORP., a Corporation, Plaintiff-Appellee, vs. PARK TRANSPORTATION CO., a Corporation, Defendant-Appellant-Appellee, LAND TITLE INSURANCE COMPANY OF ST. LOUIS, a Corporation, Defendant-Appellant, CHILDRESS AND COMPANY, INC., a Corporation; EAST ALTON ELECTRIC CO., INC., a Corporation, and FIRST GRANITE CITY NATIONAL BANK, a Corporation, Defendants-Appellees.	) Appeal from the Circuit Court of Madison County.) Honorable Harold R. Clark, Judge Presiding.

Goldenhersh, P. J.

Defendants, Land Title Insurance Company of St. Louis, hereafter called Land Title, and Park Transportation Co., hereafter called Park, appeal from the decree of the Circuit Court of Madison County.

Park owned a parcel of land in Madison County upon which it planned to erect a terminal building for use in its trucking business. It entered into two contracts with defendant, Childress and Company, Inc., hereafter called Childress; under the terms of one contract Childress was to furnish architectural and engineering drawings, and under the other, it was to serve as general contractor for the erection of the terminal.

Childress, as general contractor, entered into a contract with plaintiff, Cannon Construction Corp., hereafter called Cannon, as a sub-contractor, to perform certain work for which it was to be paid $18,300.00.

Park, Childress, and First Granite City National Bank, hereafter called The Bank, entered into an escrow agreement with Land Title under the terms of which The Bank, as mortgagee holding a mortgage on the premises, deposited with Land Title, as escrowee, the sum of $70,000.00. These funds were to be disbursed by Land Title upon terms and conditions which will be discussed to the extent necessary to this opinion.

Cannon filed its complaint to foreclose a mechanic's lien and joined as parties defendant, Park, Childress, Land Title, The Bank and East Alton Electric Co., Inc.. It alleged completion of the work to be performed under the contract, $5,481.90 in authorized extras, and an unpaid balance due it of $13,561.90.

Childress filed a counterclaim against Land Title alleging that it negligently and carelessly paid out $16,766.11 to "improper parties", a portion of the money was due Cannon, and praying the entry of an order directing Land Title to pay Cannon any sums found to be due it.

Land Title filed a counterclaim against Childress alleging it had agreed to deposit any additional funds necessary to complete the improvements, that there remained in the escrow fund the sum of $1,366.04, all disbursements which it made were in compliance with written orders from Childress, and praying that the court determine the amount required to complete payment for the improvements, and order Childress to deposit with Land Title all sums so found to be due in excess of the amount remaining in escrow.

Childress counterclaimed against Park alleging the performance of certain authorized extras and praying judgment in the amount of $7,547.85.

Park counterclaimed against Childress alleging failure to complete certain items of work, the unskillful performance of other items, and praying damages in the amount of $12,000.00.

Park counterclaimed against Land Title alleging that it had wrongfully made payments to Childress and other parties and praying that in the event of a judgment in favor of Cannon and against Park the court enter judgment in favor of Park and against Land Title in the amount of the judgment entered in favor of Park.

Following a non-jury trial, the circuit court found for Cannon on its complaint and awarded it $13,561.90 together with prejudgment interest in the amount of $2,399.63, making a total of $15,961.53. It found further that Cannon's lien was superior to the lien of the mortgage held by The Bank.

The court found there was due Land Title from Childress the sum of $10,883.03, less $1,366.04 remaining in escrow and entered judgment in favor of Land Title on its counterclaim against Childress in the amount of $9,516.99.

On Childress' counterclaim against Park the court found Childress was entitled to $5,078.50 for extras, less $1,114.00 paid by Park for architectural fees, making the net amount due on Childress' counterclaim to be $3,964.50.

On Park's counterclaim against Childress the court found there was due it from Childress for work uncompleted, or completed in an unworkmanlike manner, the sum of $9,998.72. The court credited against

this amount the sum of $3,964.50 found to be due Childress from Park, and entered judgment in favor of Park and against Childress in the sum of $6,034.22.

On Childress' counterclaim against Land Title, the court entered judgment in favor of Land Title and against Childress.

On Park's counterclaim against Land Title the court entered judgment in favor of Park and against Land Title in the amount of $15,961.53. The court further ordered that the balance of $1,366.04 remaining in the escrow fund be applied by Land Title toward payment of the judgment against it.

In its appeal Park contends the record shows that Cannon failed to give notice of its claim as required by Ch. 82, sec. 24, Ill. Rev. Stat. 1967, and the court's findings as to the amounts due Cannon are against the manifest weight of the evidence.

The evidence shows that Childress furnished Land Title a statement in substantial compliance with the provisions of Ch. 82, sec. 5, Ill. Rev. Stat. 1967, and lien waivers executed by Cannon upon receipt of partial payment are in substantial compliance with section 24. Park is a non-resident and the record shows Cannon filed a claim for lien in compliance with the provisions of Ch. 82, sec. 25, Ill. Rev. Stat.. In its pleadings, Park made no issue of the sufficiency of, or failure to give, notice, and raised the question for the first time, on appeal. Under the circumstances the trial court's finding that Cannon is entitled to a mechanic's lien will not be disturbed.

With respect to Park's contentions concerning the court's findings of fact, from our examination of the record we are unable

to say that the findings complained of are manifestly erroneous, and therefore, they will not be disturbed. People ex rel v. C. & N. W. Ry. Co., 17 Ill. 2d 307.

Land Title, as grounds for reversal, argues that the factual findings of the trial court are manifestly erroneous, and the evidence shows that Park has failed to perform duties and obligations under the contract which are conditions precedent to its right of recovery from Land Title.

Land Title also complains of the court's refusal to grant it leave to file a counterclaim against Park. The record shows that this case had been pending some 17 months at the time of trial. Although Land Title had filed its answer to Park's counterclaim several weeks earlier, it did not request leave to file the counterclaim until the second day of trial. Under the circumstances, in denying leave to file the counterclaim, the trial court did not abuse its discretion.

Under the terms of the escrow agreement Park agreed to deposit with Land Title funds necessary for the completion of the improvements, all authorized extras, and all other items payable by it as owner of the premises. It further agreed that payments made by Land Title for labor and material shall be made on the written order of Childress "which the owner (Park) hereby ratifies and agrees to".

Land Title, as escrowee, agreed to use due care in the disbursement of funds. It had the right to make payments for labor, services, materials and incidentals without first securing a voucher signed by Childress. It agreed to inspect the progress of construction at regular intervals and not make payments unless inspection revealed incorporation into the improvements of the item for which payment was

made.

The escrow agreement contains the following provisions:

"11. The 'Contractor' (Childress) agrees not to authorize the payment of any of his profit until all costs for the construction of said improvements have been paid in full, and the said improvements duly accepted by Owner (Park), and further agrees to give 'Escrowee' (Land Title), written notice within 10 days of the receipt of any lien notice or notice of any suit affecting the property under this agreement."

"24. The 'Owner' agrees to immediately notify the 'Escrowee' in writing of any deviation, defect or change in the construction of said improvements, and take immediate steps to correct the same, and failure to so notify 'Escrowee' shall be deemed a full acceptance of such construction, and further agrees to give 'Escrowee' written notice within 10 days of the receipt of any lien notice or notice of any suit affecting the property under this agreement."

"46. Nothing in this agreement shall be construed to imply architectural supervision by the 'Escrowee'. The 'Escrowee' does not provide architectural supervision."

The testimony shows that Park moved into the premises on April 27, 1964. It made no complaint to Land Title until after that time, and it cannot be determined from the record when the complaint was made. Of the extras claimed by Cannon, Park disputed only $992.97. The record reflects payments made by Land Title subsequent to its receiving notice of the filing of Cannon's claim for lien but it is not contended that the money was not owed the recipients for work or materials.

Although the trial court made no specific findings of fact, it must be assumed that the judgment against Land Title was based upon its failure to properly perform its duties as escrowee. United City of Yorkville v. Lewis Const. Co., 48 Ill. App. 2d 463. However, we are unable to find any basis in the record for holding Land Title liable in the amount of Cannon's lien. Neither the evidence of its

failure to inspect, nor the evidence of the improper disbursement of funds, will support a judgment in that amount.

The escrow agreement specifically provides that Land Title is not required to furnish architectural supervision. The items of damage testified to by William Flippo, an architect called by Park, do not come within the scope of Land Title's inspection, and assuming, arguendo, they did, Park admittedly made no complaint, as required by paragraph 24 of the agreement until long after acceptance of the building.

The only loss to Park proved by the evidence results from Land Title's payment to Childress of profit and overhead in the amount of $8,174.58. In view of paragraph 11 of the escrow agreement, and under the circumstances reflected in this record, the payment of this sum cannot be reconciled with Land Title's duty to use due care in the disbursement of the funds. Park is entitled to recover from Land Title that amount, and the balance of $1,366.04 remaining in the escrow fund.

Exercising the powers vested in this court by the provisions of Supreme Court Rule 366, we modify the decree of the Circuit Court of Madison County to the extent indicated. The cause is remanded to the Circuit Court of Madison County with directions to vacate that portion of the decree which enters judgment in favor of Park Transportation Company and against Land Title Insurance Company of St. Louis, and enter judgment in favor of Park Transportation Co. and against Land Title Insurance Company of St. Louis in the amount of $9,540.62, and in all other respects the decree is affirmed.

Decree affirmed, and cause remanded with directions.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

V 116 page 156

53096

116 I.A. 2nd 156

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
vs.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
THOMAS HALE A/K/A THOMAS HAIGHT, Defendant-Appellant.	)	HON. FRANCIS T. DELANEY, JUDGE PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant who was indicted for the crime of the offense of burglary was indigent and the Public Defender was appointed to represent him. At the time of arraignment he filed a plea of not guilty. The record reveals that the defendant moved for a change of venue which was allowed. On April 21, 1967, the Public Defender was given leave to withdraw upon motion of the defendant and Joseph A. Ettinger filed his appearance to represent the defendant. On June 4, 1967, an order was entered at the request of Ettinger that Dr. William Haines of the Behavior Clinic of the Circuit Court examine the defendant as to his mental condition. A written report was made by Dr. Haines which concluded with the statement that the defendant knew the nature of the charge and was able to cooperate with his counsel. On September 5th, 1967, Joseph A. Ettinger was given leave of court to withdraw his appearance. On November 29, 1967, Howard C. Goode filed his appearance as attorney for defendant.

On December 19, 1967, when this cause came up for trial, the plea of not guilty was withdrawn and counsel for defendant informed the Court that the defendant desired to enter a plea of guilty. The Court admonished the defendant of the significance

and consequences of his plea and upon the defendant's persistence the plea of guilty was entered. After hearing testimony stipulated to by agreement between the prosecutor, the defendant and his counsel the Court sentenced the defendant to a term of three years to three years and a day in the Illinois State Penitentiary. On May 29, 1968, the defendant filed a notice of appeal and the Public Defender was appointed as his counsel and he filed a record of proceedings. On July 22, 1969, a motion was filed by the Public Defender in which he asks leave of this court to withdraw as attorney of record on the ground that no appealable error could be found and in support of said motion he filed a brief pursuant to Anders v. California, 386 U. S. 738.

The Public Defender points out in his brief that it appeared from his review of the transcript that the only basis for an appeal would be (a) whether the court fully admonished the defendant as to the significance and consequences of his change of plea from not guilty to guilty and (b) whether a sanity hearing should have been held.

A plea of guilty may be accepted in open court when the court finds that the defendant understands the nature of the charges against him and the consequences of his plea, and understanding this, pleads guilty. Supreme Court Rule 401 (b)(Ill. Rev. Stat., ch. 100A, Sec. 401 (b)). The defendant was represented by an appointed private lawyer when he entered his plea of guilty. Under Chapter 38, Section 115-2 of the Criminal Code it sets forth the requirements to be given a defendant on a plea of guilty, as follows:

> (a) Before or during a trial a plea of guilty may be accepted when:

(1) The defendant enters a plea of guilty in open court.

(2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

(b) Upon acceptance of a plea of guilty the court may hear evidence of the charge.

The record discloses that the Trial Judge discussed with the defendant the significance of his plea of guilty and advised the defendant of the consequences of a guilty finding. The Court fully and completely warned the defendant (People v. Outten, 22 Ill. 2d 146, 174 N.E.2d 685 (1961)) and the acceptance of his plea in our judgment was proper.

There was no request for a sanity hearing and no suggestion of insanity appears in the record. The motion for a Behavior Clinic examination was made and allowed. Dr. Haines concluded after his examination of the defendant that he knew the nature of the charge and was able to cooperate with his counsel.

This Court notified the defendant of the Public Defender's motion to withdraw and afforded him ample opportunity to file any points he might have to support his appeal. No response has been received.

From the issues raised by the Public Defender and our own examination of the proceedings, we find no merit to an appeal. It cannot be reasonably contended that the defendant did not understand his rights, the nature of the crime with which he was charged and the punishment fixed by law for this crime.

The defendant's counsel is granted leave to withdraw and the judgment of conviction is affirmed.

AFFIRMED.

ADESKO, P. J. AND MURPHY, J. CONCUR.

(ABSTRACT ONLY)

116 I.A. 2nd 162

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
DANIEL DAVIS, Defendant-Appellant.	COOK COUNTY.
	HON. JAMES J. MEJDA, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crimes of armed robbery, rape and deviate sexual assault, and was sentenced to a term of four years to ten years in the penitentiary for each offense, the sentences to run concurrently. He appeals.

Mrs. Helen Casey testified that on January 1, 1966 she was the manager of a 76-unit apartment building in the 3900 block of South Michigan Avenue in Chicago and occupied a third floor apartment in the building with her fourteen year old son, Daniel, and a daughter. Approximately 9:30 A.M. on that date, a man, later identified as the defendant, knocked on her apartment door and inquired about the rental of an apartment.

Mrs. Casey testified that she admitted defendant into the apartment and that as she was about to inform him as to what units in the building were available, defendant placed a gun to her stomach, demanded the building rent receipts, and marched her into the bedroom of her son who had just been awakened by noises made by her. After threatening Mrs. Casey and Daniel with death if they attempted to summon aid, defendant tied Daniel's hands and feet with a belt and a shirt, and gagged him with stockings and a scarf. Defendant then led Mrs. Casey to her own bedroom where, at gunpoint, he forced her to engage in an act of oral copulation and an act of sexual intercourse.

Defendant demanded the keys to the building safe and Mrs. Casey informed him that the janitor had them. Mrs. Casey testified that the defendant then marched her downstairs to the basement boiler room in search of the janitor, Thomas Mitchell. Mitchell informed Mrs. Casey that he had placed the keys on the piano in her apartment. Mrs. Casey and the defendant returned to the third floor for the keys and then went to the building office on the first floor where the building safe was located. Defendant forced Mrs. Casey to unlock the safe and, after seizing the rent collection envelopes, he fled. Defendant had been with Mrs. Casey during the incident approximately thirty minutes, and in the presence of Daniel Casey approximately five minutes. A few minutes after defendant left the premises, the police arrived, having been summoned by Daniel Casey after he freed himself when defendant and Mrs. Casey went to the basement in search of the janitor.

On January 6, 1966 Helen Casey, Daniel Casey and Thomas Mitchell viewed photographs of "robbers and rapists" on the screen of a television-type apparatus at police headquarters. All three viewed the photographs together and simultaneously identified the photograph of the defendant as being that of the assailant. However, Thomas Mitchell testified at trial that he was unable to identify the defendant, or to recognize him, due to the fact that he saw only the back of the person who was with Mrs. Casey in the basement, not his face.

On January 10 , 1966 Mrs. Casey and Daniel Casey viewed a four man line-up at police headquarters. All four men initially had their backs to the witnesses and faced the wall as the witnesses stood behind them. The four men were then told to turn and face away from the wall, and, upon seeing Mrs. Casey, the defendant fell

back against the wall; his eyes began to roll and he began to lick his lips. The People's evidence reveals that defendant had to be reprimanded several times for leaning against the wall, whereas none of the other men in the line-up leaned against the wall. It is undisputed that defendant was "a head" shorter than the other men in the line-up, and that the other men were either heavier or thinner than the defendant. Both Mrs. Casey and Daniel Casey in their description to the police of the assailant, specifically referred to a scar which he bore on his forehead, and which defendant had on his forehead, and both witnesses identified defendant at trial as being the assailant.

Defendant raised the defense of alibi. McKinley Bates testified that on the morning of the incident the defendant was in Bates' apartment in the 3000 block of West Washington Boulevard in Chicago from 8:00 A.M. until about 8:50 A.M., except for an interval of about fifteen minutes when he went to the store two blocks away. He testified that defendant left the apartment about 8:50 A.M.

Defendant's wife testified that defendant was in their apartment from before midnight on December 31st until approximately 8:00 A.M. on January 1st, at which time he was summoned by Bates' son and left the apartment for about 45 minutes. She testified that defendant returned at approximately 8:45 A.M. and that he went to bed and slept until 3:00 P.M. that afternoon. Defendant testified in his own behalf and denied the acts complained of. He further testified that he was asleep in his bed from approximately 9:00 A.M. on January 1st until 3:00 P.M. that afternoon.

Defendant first contends that he was deprived of his right to a fair trial by certain allegedly inflammatory and prejudicial remarks

made by the prosecutor during closing argument. In dealing with this question it is necessary to set out verbatim not only the remarks of the prosecutor in that regard, but also the comments made by defense counsel in his closing statement prior thereto, to which the prosecutor's remarks were directed.

In closing argument to the jury, defense counsel stated:

> "Let's talk about the case against the defendant. There is a robbery that is supposed to have occurred and a woman goes down to the police station and looks at some photographs 'of robbers and rapists.' These are the photographs she looked at. You heard the defendant testify from the stand (sic) I have never robbed anyone, I have never raped anyone.
>
> "Could not the State, if this were not true, rebut that? Could they not have put on any police officer with the record of his conviction saying this man is a convicted robber, this man is a convicted rapist?
>
> "This man comes before you clean. He doesn't have any record for being a robber or rapist. Yet she went down to the police station to look at photographs of robbers and rapists.
>
> "Now, did she find his photograph? Maybe she did and maybe she didn't. But I would like to see the photograph. And did you see it as jurors? Was it here in evidence, the photograph of the defendant as a robber or a rapist? Was there any photograph brought in here? Was there any testimony as to how many photographs she looked at? Couldn't we have taken a look at it and say, well, now, this really looks like this defendant we have got over here, and it is a good photograph of him, and there is no question. But where is the photograph? I don't know. I never saw it."

During the People's rebuttal to the closing statement of the defendant, the prosecutor stated to the jury:

> "There was some talk, and it is a little touchy situation, I don't want to go into it too well, about the fact that the defendant testified he never raped and robbed anybody. Well, we could go out and perhaps bring some people in and -- but we are not here to try another case, we are trying this one case.
>
> "And the fact that his photograph was there and the fact that they saw it -- well, we could show you a photograph, we could show you a number on it, but this would not make you believe or disbelieve anymore that (sic) this was the man or not, because the point of it is you know he was arrested, they didn't dream him up. He was arrested because he was identified from a photograph. There is some question about the propriety of showing a photograph with a number on it and -- but you know that he had to identify, that they had to identify the photo-

> graph for them to find out who he was and arrest him. You know they knew who he was and they went there to arrest him."

A reading of the above portions of the comments made by both trial counsel reveals that the remarks made by the prosecutor were in part brought on by the earlier comments of the defense counsel. The existence of the police photographs from which defendant was initially identified was first questioned by defense counsel, and the prosecutor had a right to comment generally in that regard. People v. Lewis, 25 Ill. 2d 442; People v. Edwards, 98 Ill. App. 2d 128.

With respect to the prosecutor's reply to defense counsel's statement that defendant testified that he had never raped or robbed anyone, namely, that the People "could go out and perhaps bring some people in and — but we are not here to try another case, we are trying this one case," such remark was clearly improper. It left the impression that defendant had in fact committed other rapes and/or robberies and that the People had witnesses available to testify to the same, even though no evidence of a conviction thereof had been introduced. See People v. Fort, 14 Ill. 2d 491, 501. However, since the evidence in this case so overwhelmingly proves defendant's guilt, there is no doubt that the jury would have found defendant guilty without the remark having been made by the prosecutor. See Harrington v. California, 37 U.S.L.W. 4472.

Defendant further states that it was error to have allowed the prosecutor, in the same argument to the jury, to comment that the People could produce a photograph of the defendant "with a number on it." Not only was this comment also brought on by the earlier remarks

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Defendant further states that it was error to have allowed the prosecutor, in the same argument to the jury, to comment that the People could produce a photograph of the defendant "with a number on it." Not only was this comment also brought on by the earlier remarks

of defense counsel, but the defendant, during the cross-examination of Mrs. Casey, asked no less than eight questions specifically regarding "the photographs of robbers and rapists" which she had viewed at the police station.

Defendant next contends that the circumstances surrounding his identification show a violation of due process of law. He states that his physical size (relative to the other three men in the police line-up,) the scar on his forehead, and the reprimands he received during the line-up all brought specific attention to him, and secondly, that it was improper for Mrs. Casey and Daniel Casey to be present together at the line-up at which they identified him as the assailant.

Defendant's position first overlooks the fact that Mrs. Casey and Daniel Casey identified defendant simultaneously while viewing the photographs at police headquarters prior to their identification of him at the line-up. The United States Supreme Court has held that each case of such nature must be considered on its own facts and circumstances, and that only where the photograph identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, will a conviction based upon an eyewitness identification at trial following such pretrial identification by photograph be set aside. Simmons v. United States, 390 U. S. 377, 384-385. In Simmons, the Court held that it was proper for the authorities to resort to photographic identification of suspects since a serious crime had been committed, the perpetrators were still at large, and there was little chance of misidentification by the witnesses.

Both Mrs. Casey and her son, Daniel, testified that they observe

the assailant for considerable periods of time during the incident, Mrs. Casey for thirty minutes and Daniel for five minutes. The assailant made no attempt to mask his face or to otherwise disguise his identification. At the police headquarters five days after the incident, Mrs. Casey and Daniel simultaneously identified the defendant as the assailant while viewing photographs which were flashed across the screen of a television-type apparatus. The identification of the defendant at trial by these two witnesses was unshaken on cross-examination. It is clear that the requirements of Simmons were met in the photograph identification procedure followed below and that the testimony by the identifying witnesses was properly admitted into evidence at trial.

Secondly, the contention that attention was specifically drawn to the defendant at the line-up because of his physical size, the scar on his forehead, and the reprimands received by him, overlooks the fact that both Mrs. Casey and Daniel Casey testified that the men in the line-up initially had their backs to the witnesses and when the men were told to face the witnesses, the defendant fell back against the wall and began to roll his eyes and lick his lips. The reprimands received by defendant were the result of his leaning against the wall on several occasions during the line-up. If attention was drawn to defendant in the line-up, it was due to his own actions rather than to the circumstances surrounding the line-up.

The cases cited by the defendant in support of his position are inapplicable on their facts. The holdings in Gilbert v. California, 388 U. S. 263, and in United States v. Wade, 388 U. S. 218, are specifically acknowledged in Simmons v. United States, supra, and, as shown above, the facts presented here, as well as the date that the line-up was held, do not admit of the application of the doctrine

set out in the Gilbert and the Wade cases.

In People v. Caruso, 65 Cal. Rptr. 336, the nature of the line-up clearly violated due process in light of the fact that defendant was set apart from the other men in the line-up by his substantial size and his coloring, and the fact that the two identification witnesses received only a fleeting glance of the suspect during the commission of the crime. In People v. Blumenshine, 42 Ill. 2d 509, the defendant and another person suspected of the crime were first shown to two of the witnesses in a "one-man" line-up, and then shown as a pair. Other witnesses identified the defendant as one of the perpetrators of the crime after they had been told by the police that the police had suspects in custody and the witness had been asked to view them in a line-up. Such is not the situation in the instant case.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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116 I.A. 2nd 168

PEOPLE OF THE STATE OF ILLINOIS, Appellant, vs. JOSEPH CORABI and FRANK MININNI, Appellees.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Emmet Morrissey, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the State under Supreme Court Rule 604(a) from an order of the Circuit Court of Cook County quashing a search warrant and ordering the return of certain monies seized from the defendants pursuant to the execution of the warrant and their arrest. The warrant authorized a search of the defendant Mininni and of the first floor of the premises located at 1525 West 69th Street, Chicago, Illinois. The premises authorized to be searched, known as the Club Barber Shop and Billiard Parlor, are owned by the defendant Corabi. The single contention made by the State is that the Circuit Court erred in finding that the complaint for the warrant was not sufficient to establish probable cause.

The complaint was based on the hearsay of two unnamed informants. In it the complainant, Officer Jack Ohanian of the Chicago Police Department averred:

1. He was assigned to conduct a gambling investigation concerning Frank Mininni.

2. On April 13, 1967, he spoke with a confidential informant who he had known for two years and who had given him information on criminal matters on at least ten separate occasions, each time the information having proved to be truthful and accurate. This informant told complainant that he had been in the Club Barber Shop and Billiard Parlor on at least five occasions during late March and April, 1967, and saw Frank Mininni accept horse bets from people who came into the billiard parlor.

3. The complainant met this same informant on April 19, 1967, and the informant revealed that he had been

in the Club Barber Shop and Billiard Parlor on the previous day and saw Frank Mininni accept horse bets.

4. On the evening of April 13, 1967, complainant spoke to a second confidential informant who he had known for approximately six months, during which time he had given complainant information on criminal matters, including information on an illegal gambling location. The information given by this second confidential informant had proven to be truthful and accurate. This second informant told complainant that he had heard of gambling at the Club Barber Shop and Billiard Parlor.

5. The second informant was again met by complainant on April 17, 1967, and at that meeting he disclosed that he had been in the Club Barber Shop and Billiard Parlor on April 13, 1967, and had seen defendant Mininni accepting horse wagers.

6. On April 13, 17, and 18, 1967, complainant conducted a surveillance of the premises and saw Frank Mininni arrive at approximately 11:00 A.M. and leave at approximately 4:00 P.M., departing in a 1964 Ford auto bearing license plates subsequently traced to Frank Mininni. The complainant did not see any barbers on the premises nor did he see anyone getting a haircut.

7. Complainant checked the police files and found Frank Mininni to have a reputation as a gambler.

The Supreme Court of the United States held in Jones v. U.S., 362 U.S. 257, 80 S. Ct. 725 (1960) that probable cause can be established for the issuance of a warrant based on the hearsay of an informer provided a substantial basis for crediting the hearsay is presented. In Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964) the court established a "two pronged" test for determining whether a substantial basis for crediting the hearsay of an unnamed informant has been established. First, the judicial officer asked to issue the warrant must be informed of the underlying circumstances which led the informant to reach the conclusions upon which his accusation is based. Second, he must also be advised of the underlying circumstances from which the affiant concluded that his informant is credible or his information reliable.

We find the instant affidavit to have satisfied the

first portion of the test. The underlying circumstances which caused the informants to conclude that a crime was being committed and served as the basis of their accusations are clearly specified in the affidavit as personal observation of the defendant Mininni by each informant.

Likewise, the second portion of the Aguilar test, requiring that the underlying circumstances upon which the affiant concluded that the informants are credible or their information reliable appear in the affidavit. First, the same information regarding defendant Mininni's activities within the Club Barber Shop and Billiard Parlor was received from two separate sources of information on two separate occasions. In addition, the first informant had given truthful information on ten previous occasions. We believe that the past reliability of this informant serves as a basis from which it might reasonably be inferred that he is credible and his information reliable. This inference, coupled with the fact that identical information was received from another source (the second informant), provides a basis for belief that the first informant is credible and his information reliable.

We hold that the standards set forth in Aguilar were satisfied by the instant affidavit and that the information contained therein was sufficient to establish probable cause for the issuance of the warrant.

Defendants' motion to dismiss the appeal, which was taken with the case, is denied. The judgment of the Circuit Court quashing the warrant is reversed and the cause remanded for trial.

REVERSED AND REMANDED.

BURKE, J., and MC CORMICK, J., concur.

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116 I.A. 2nd 172

Consolidated Causes No. 52340, 52440 and 54075

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JANE M. CARROLL, Counter-Plaintiff & Defendant Appellant, vs. DAVID M. CARROLL, Counter-Defendant & Plaintiff Appellee.	Appeal from the Circuit Court of Cook County, Illinois. Hon. Fred G. Suria, Jr. Judge Presiding.
DAVID M. CARROLL, Plaintiff & Appellee, vs. JANE M. CARROLL, et al., Defendants.	Hon. Donald J. O'Brien, Judge Presiding.
JANE M. CARROLL, Defendant & Appellant.	

EBERSPACHER, J.

This cause involves the consolidation of three separate appeals from three separate decrees and orders and a petition filed in this Court for Rule to Show Cause. The decrees and orders were entered in separate proceedings, the first a partition, the second a divorce suit.

The parties to this action were married in September, 1945. There were two children born to the parties, one of which had been emancipated prior to these proceedings. The husband is the appellee plaintiff in the partition proceedings, and is the plaintiff appellee and counterdefendant in the divorce proceedings.

The wife is the defendant appellant and counterplaintiff in the divorce proceedings, and the defendant appellant in the partition proceedings, as well as the petitioner in the Rule to Show Cause in which the husband is the respondent.

The parties separated on September 24, 1965, when at that time the husband absented himself from the family home. On December 15, 1965, the husband filed a complaint for partition against the wife. The jointly held family residence subject to two mortgages was the subject of the partition. The husband was granted a decree of partition of June 17, 1966 by the Circuit Court of Cook County, an order of default having been entered against the wife on March 30, 1966.

On May the 29th, 1967, the wife filed a petition with the Circuit Court of Cook County asking that the decree for partition be set aside. On July 11, 1967, the petition was dismissed. An appeal was taken from the dismissal. In the Spring of 1969, while this appeal was before this Court, and after a motion for Supersedeas and To Fix Supersedeas Bond had been filed, the husband proceeded to cause the property to be sold under the decree of partition. On June 5, 1969, the wife petitioned this Court for a Rule to Show Cause, contending the husband was in contempt for proceeding under the partition decree while her motion for Supersedeas and To Fix Supersedeas Bond was pending; the Motion for Supersedeas was denied on June 13, 1969. The wife continued to live in the family residence after the sale, and an order was entered upon her to vacate and for a magistrate to execute necessary documents in her stead, from which order she perfected an appeal.

The divorce proceedings were commenced on September 30, 1966, when the husband filed a complaint against his wife alleging desertion. The wife answered denying the material allegations of the complaint and filed a counterclaim on December 20, 1966, also alleging desertion. On January 7, 1967, the husband filed his answer to the counterclaim denying the desertion allegation. The matter was set for trial on January 17, 1967, however was continued on that date until February 1, 1967.

On February 1, 1967, the cause was heard as a non-contested case, the

husband by his attorneys dismissing his complaint. The wife proceeding upon her counterclaim, testimony was offered by the wife, her neighbor and emancipated daughter. The husband did not testify or present evidence on his behalf.

The wife testified in part that the parties, through no fault of her own, had lived separate and apart since September 24, 1965, that there was an oral property settlement agreement, as well as facts sufficient to give the court jurisdiction.

The wife was granted a decree of divorce which was entered on March 1, 1967, upon the husband's request and over the wife's objections.

In the decree of divorce the wife was granted a divorce, custody of the minor child and approval of the oral property settlement agreement as testified to by the wife. The wife had informed her attorney that she was unhappy with the decree, and the wife's objections were presented by her attorney at the date of the entry of the decree. The wife was not present.

The wife continued to express dissatisfaction with the decree, and on the 30th day following the date of the decree the wife filed a post-trial motion to set aside, alleging that there had been no oral agreement.

At the divorce trial the wife had testified that there was an oral agreement. The oral agreement, according to her testimony, was as follows: The wife to have custody of the minor son and to receive $150.00 per month for his support, and the payment of all extraordinary medical expenses; further that the property (the subject of the partition) was to be sold and the proceeds divided 1/3 to the husband, 2/3 to the wife, and the wife who was occupying the property was to make the monthly mortgage payments until the sale of the property was completed; that the wife was to receive $450.00 per month for 121 months as alimony in gross; that the husband was to carry $24,000.00 worth of life insurance with the wife as beneficiary to assure the payment of alimony; finally, disposition was made of stock owned by the parties and certain outstanding debts, and provision was made to transfer ownership of an automobile from the husband to the wife, the husband providing some $325.00 for repairs of the then 4 year old automobile.

The wife testified to the above terms primarily by answering "yes" to leading questions. The wife, however, in reply to other questions during the brief trial, not

only gave negative answers but also made direct statements.

Upon cross-examination the wife replied "Yes" when asked, "These terms have been explained to you?", "You have entered into this voluntarily and you understand all the terms?", "There is no question about it?", the wife responded "No". Then upon questioning by the Court, "Do you understand the agreement?", the wife answered "Yes".

The wife in her post-trial motion contended that there was no oral agreement; that she was confused, scared and intimidated at the time she took the witness stand; that she did not realize that she was actually at the divorce trial; that her attorneys had threatened her and had told her to answer "yes" to all questions asked. The wife requested that the decree be modified, granting to her additional alimony and child support.

A supplemental petition in support of the post-trial motion was filed April 3, 1967, wherein the wife asked that she be allowed to file her amended petition for separate maintenance.

Copies of the post-trial motion and supplemental petition were served on both husband's counsel and the wife's trial counsel. (The wife having obtained new counsel in her attempt to set aside the divorce decree. The wife having also had at least one other prior legal counsel prior to the trial counsel). Both filed answers denying the wife's charges.

Hearing was had on the post-trial motion and the supplemental petition of April 13, 1967, at which time testimony was heard from the wife's trial counsel, the wife, the daughter and the wife's mother.

The wife testified that she did not know that she was to obtain a divorce, but that she thought that she was to attend a pretrial conference, that she made no oral property settlement agreement, that her counsel had informed her that she must say "Yes" to all questions asked. The testimony of the daughter and mother was in support of the wife. The wife's counsel's testimony was not in support, but denied the wife's allegations.

A review of the transcript shows that, although the wife did in fact answer "yes" to a great majority of the questions propounded by her counsel, opposing counsel and the Court, she did also reply in the negative upon occasion, and she did make other statements which belie her contention that she did not understand the proceedings. Further, examination of the transcript does not show anything so unusual or different from the proceedings of a non-contested divorce hearing that would indicate any unusual mental state existing in the wife. Further, the wife was accompanied by her daughter, mother and neighbor, who testified in the divorce proceeding.

The wife filed another petition on May 3, 1967, wherein she asked the Court to provide reasonable alimony and child support, as well as certain other financial benefits, the wife stating the increase was necessary because of the inadequacy of the decree. The husband's answer denied this allegation.

On May 9, 1967, the Court denied the post-trial motion and supplemental petition, and set the May 3rd petition for a hearing to determine the fairness of the property settlement agreement and to modify the Decree of Divorce if it were to be deemed necessary.

The wife filed her notice of appeal on May 9, 1967 from the order denying the post-trial and supplemental petition.

On July 26, 1967, the Court modified the divorce decree upon its finding that the agreement was unfair to the wife. The Court ordered the alimony in gross of $450.00 per month for 122 months to be changed to $375.00 per month for life. The husband was also to provide $12,000.00 life insurance for life, and not $24,000.00 for the period of the alimony in gross. The husband, rather than the wife, had made the monthly payments on the mortgages, and the closing of the sale of the property was being held up by the wife; the husband's attorneys waived their fees in the partition proceeding; the court also modified the provision that the wife was to receive 2/3 of the proceeds of the sale of the property to provide that she was to receive 1/2 of such proceeds, the amount which she was awarded by the partition decree which had become final. The wife appeals from this modification. The wife contends that

if the trial court makes a finding that the original property settlemt was unfair then afortiori the modification is unfair because she is now receiving less money.

On appeal the wife lists four assignments of error: (1) That where the Court was advised that the innocent party did not want a decree of divorce entered in their favor, it is the duty of the Court to refuse to enter a decree of divorce, and where a motion to vacate such decree was made within 30 days, the Court should have granted said motion and permitted the wife to file an amended complaint for separate maintenance as requested. (2) That the award of alimony is so palpably inadequate as to require reversal ipso facto. (3) Where there was no written settlement agreement and where the wife was not advised by her attorneys as to the terms of a proposed settlement agreement, apparently agreed upon by respective counsel, the trial cout should not have entered a decree of divorce predicated upon a so-called oral agreement. (4) That the Court should have permitted the wife to open up or set aside the decree for partition entered by default where it appears that the divorce action had in effect absorbed or superseded the partition action.

The wife is entitled to a review of the evidence by this Court, which is obliged to reach its own conclusions, and affirming or reversing as justice under the law requires. However, we accord deference to the conclusions, and there is a presumption of correctness, of the trial judge, who had the advantage of seeing the parties, observing their demeanor and conduct, and being thereby better able to weigh and evaluate the testimony. Patterson v. Patterson, 47 Ill. App. 133, 177 N.E. 2d 724 (1964); Olson v. Olson, 66 Ill. App. 227, 213 N.E. 2d 95 (1965). Unless the decision of the divorce court is manifestly against the evidence it will not be disturbed. Bidstrup v. Bidstrup, 46 Ill. App. 160, 196 N.E. 2d 512 (1964).

This marriage had been in existence for more than 20 years at the time of the filing of the original action by the husband. The parties had lived separate and apart for more than one year at that time. At the time the wife alleges she no longer desired a divorce the parties had been living apart for more than 18 months. At no time did the wife express any desire or hope to return to her husband and be his wife. The wife,

however, did often express dissatisfaction with the financial terms of the divorce. These terms she testified that she understood and agreed to, testifying not only in response to questions, albeit leading, from her trial counsel, but also the opposing trial counsel and the trial judge. The cases cited by the wife do not support her contention that she be allowed to set aside the decree. Van De Ryt v. Van De Ryt, 6 Ohio St. 2d 31, 215 N.E. 2d 698, 16 A.L.R. 3rd 271, is distinguishable in that the wife, in that case, made it manifestly obvious at the trial that she did not want to be divorced. "Appellant three times protested that she did not want a divorce." This was not the situation before us. In the present case, in the wife's post-trial motion to set aside, the prayer was not that the divorce be set aside and the marital status resumed, but rather that the divorce decree be set aside and that a "new and proper decree be entered . . . . . awarded additional alimony . . . . . additional attorney fees be assessed . . . . .". This prayer was amended by the subsequent supplemental petition which prayed that the wife be allowed to amend her complaint to seek a decree of separate maintenance. It appears that the wife did not desire to save the marriage, but that she did desire a more favorable property settlement; the husband having seen fit to remarry on March 3, 1967, only two days after the decree of divorce granted in accordance with the wife's prayer in her counterclaim.

The wife contends that the decree of divorce should not have been entered over her objections. The objections have not been to the entry of the decree itself, but to the financial terms of the decree. The contention of the wife is without basis as the decree remains in the province of the trial judge as required by our statute. Ill. Rev. Stat. (1967), Ch. 40, sec. 5.

The second point urged by the wife for reversal is that the award of alimony and child support was so inadequate as to require the Court to reverse. It is the wife's contention that the figure of $450.00 per month for 10 years, (there is some variation in the record between 120, 121, 122 monthly payments), plus life insurance of $24,000.00 to be carried for 10 years to assure the alimony payment, is inadequate.

She further contends that when the trial court on subsequent hearing, upon the

fairness of the decree, modified the decree by decreasing the monthly amount to $375.00 per month and the insurance to $12,000.00, and removing a time limitation for payment, in fact, was even less fair to wife and thereby even more inadequate. Although a different result might well have been reached in both instances had the original hearings been before this Court, the amount and results granted by the trial court are not so inadequate as to show that the trial court abused its discretion in the amount awarded. It appears to this Court that the trial judge had sufficient information supplied by both parties to arrive at his decision, the husband having cooperated with all requests for financial information made through both production of records and deposition. There has been no allegation that the husband attempted to conceal or secrete assets.

According to the evidence, the award of the trial court amounted to approximately 30% of the husband's income. That amount is not so inadequate as to require reversal. It is within the range of awards of: Byerly v. Byerly, 363 Ill. 517, 2 N.E. 2d 898 (1936); Stritar v. Stritar, 48 Ill. App. 2d 332, 199 N.E. 2d 274 (1964); Blowitz v. Blowitz, 79 Ill. App. 2d 380, 221 N.E. 2d 160 (1966); Richheimer v. Richheimer, 59 Ill. App. 2d 354, 208 N.E. 2d 346 (1965). In its broad discretion in awarding alimony, the court had the power to award alimony in gross as in Canady v. Canady, 30 Ill. 2d 440, 197 N.E. 2d 42, or in regular payments as in Schwarz v. Schwarz, 27 Ill. 2d 140, 188 N.E. 2d 673, and the court was within the exercise of its discretion in deciding that monthly payments of a lesser amount for a longer period with less life insurance to protect the wife over a longer period in the event of the husband's death, met the equitable requirements. Whether the court's decision to reduce the share of the proceeds from the sale of the property which the wife was to receive was motivated by a desire to make that provision conform to the final partition decree, or whether it resulted from the court's desire to generally change the settlement in the overall transition from alimony in gross to alimony for life is not disclosed, but in either event, such modification was within the exercise of discretion.

The wife next urges that the Court erred in entering a decree of divorce upon

an oral settlement arrived upon by the opposing attorneys and not agreed to by the wife.

The trial court made a specific finding in the decree of divorce that there was an oral agreement. The trial court again, at the subsequent hearing upon the fairness of the decree, specifically found that the wife knew the terms and provisions of the oral property settlement agreement. The trial judge based this finding specifically upon the wife's conduct and responses at the divorce hearing and subsequent thereto. The findings of the trial court are within the sound discretion of the trial court, and there is nothing to indicate the court abused its discretion. Bidstrup v. Bidstrup, supra.

Finally, the wife urges error for failure to reopen the partition suit which had been reduced to final judgment before the filing of the divorce action. The judgment had been final almost one year before the petition to the trial court to set aside the partition decree. The wife had not cited any authority to support her contention that the Court had any power to grant such a request, even assuming that the Court would have been desirous of granting the wife's request. We are also unable to find any justification. The husband has a right to partition. Plain v. Plain, 69 Ill. App. 260, 215 N.E. 2d 839 (1966); Heldt v. Heldt, 29 Ill. 2d 61, 193 N.E. 2d 7 (1963). The husband used no undue influence upon the wife to allow the decree to go by default. The parties had been separated some three months at the time the suit for partition was filed, and the parties remained apart throughout the entire proceedings. All proceedings are in order. Indeed, if the situation were such as the wife urges, i.e., that the partition suit was filed only to harass and to force the wife to a divorce, then there is even more reason for the wife to act to protect herself. That the wife should now be rewarded for her inaction would not be consistent with equity and fairplay.

The trial court was correct in sustaining the husband's motion to dismiss the wife's untimely petition to set aside. The motion to set aside must be filed within 30 days from the date of the entry of judgment. Ill. Rev. Stat. 1967, Ch. 110, 68.3.

Because of the reasons stated above and the findings of this Court in affirming the trial court's orders and decrees, the Rule to Show Cause requested by the wife is denied.

The decree of divorce of May 1, 1967 is affirmed. The subsequent modification of the decree by the trial court on July 26, 1967 is affirmed. The dismissal of the petition to set aside the partition decree is affirmed. The petition for Rule to Show Cause is denied.

Judgments affirmed.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ George J. Moran

V 116 P 227

No. 53634 116 I.A. 2nd 227

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
WILLIE E. VIRGIL, Defendant-Appellant.	)	HON. JACQUES F. HEILINGOETTER PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a non-jury trial the defendant was found guilty of both robbery and attempted rape. On a hearing in aggravation and mitigation he was sentenced to serve two to ten years in the State Penitentiary for each offense, the sentences to run concurrently. He now seeks to have the sentences imposed by the court reduced to a term of from two to five years. He charges that in the aggravation and mitigation hearing the State improperly characterized him as "brutally" beating the victim, whereas there is no evidence of brutality in the record. He seeks our permission to withdraw his appeal from the decision of the trial court finding him guilty and to restrict his appeal to a reduction of the sentences hereinbefore set forth. It should be noted that the trial court at the request of the defendant reduced the minimum sentences from five years to two years and therefore the only issue before this court is whether the maximum sentences of ten years are excessive.

In reviewing a sentence attacked as excessive but within the limits set by the legislature, this court should exercise restraint unless it clearly appears that the penalty imposed constitutes a departure from the fundamental law and its spirit and purpose or that the penalty is manifestly in

excess of the proscription of Article II, Section 11, of the Illinois Constitution which requires that all penalties be apportioned to the nature of the offense. People v. Smith, 14 Ill. 2d 95, 150 N.E. 2d 815. Here the sentence was well within the statutory limitations of one to twenty years for robbery and a maximum of fourteen years for attempted rape. Defendant was convicted of two serious crimes. He may be released within two years if in the opinion of the Parole and Pardon Board he has achieved rehabilitation. The fact that if he does not, he may serve the maximum is justified by the need to protect society from a repetition of the offenses of which he has been found guilty in the past and by the facts of the instant case.

The evidence showed that the defendant struck the victim in the face with her purse, dragged her to the curb and there tore off her girdle, panties, stockings and shoes. A struggle ensued which lasted about five minutes during which the victim was told that if she did not cooperate, the defendant would kill her. He halted the attack only when a passing motorist stopped to assist the victim. A sentence of ten years under these circumstances and in the absence of a finding of rehabilitation by the Parole Board within that period is not disproportionate to the serious nature of the crimes committed and the danger to society resulting from a premature release. Accordingly defendant's motion for reduction of the sentences is denied and since all other points are waived, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

/ 116 p 269

53282

116 I.A. 2nd 269

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
ROBERT RAY, Defendant-Appellant.	COOK COUNTY.
	HON. FRANCIS T. DELANEY, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crime of burglary and was sentenced to a term of six years to twelve years in the penitentiary. He appeals.

The complaining witness, Thomas Holmes, testified that on September 1, 1967 he occupied an apartment on the second floor of an apartment building located at 4742 South Michigan Avenue in Chicago. He testified that he left the apartment at approximately 10:15 A.M. on that date, and that when he left, the windows in the apartment were closed and the door leading to the common hallway was locked by means of a "padlock." Upon his return to the apartment about 2:00 that afternoon, he found the apartment door broken open and the door lock and splinters from the door jamb lying on the floor. The witness stated that his television set had been moved about two feet from the position it normally occupied, but that the apartment was not ransacked and nothing was missing. He also testified that he did not know the defendant prior to the incident, that he did not give the defendant permission to enter his apartment, and that he did not give defendant permission to remove anything from the apartment.

Allen Copeland testified that he occupied an apartment directly across the hall from the Holmes apartment. Between 10:00 and 11:00 on the morning of the day in question, Copeland was in his

apartment sleeping when his girlfriend, who resided on the third floor of the building, entered the apartment and informed him that the door to the Holmes apartment was open. Copeland testified that he investigated and found the door to the Holmes apartment closed, but that when he pushed the door it moved slightly, as if held on the inside by some heavy object. Copeland called Holmes' name but received no response. Copeland went back to his apartment, but returned to the Holmes apartment a few minutes later at which time he noticed the door slightly ajar. He testified that he again pushed the door and a television set, which was normally in a corner of the apartment, slid away from the door as he pushed. Copeland testified that he then observed the defendant inside the apartment.

Copeland testified that he inquired of the defendant as to the whereabouts of Holmes and that defendant replied that he was in the apartment sleeping. Defendant thereupon left the apartment and proceeded downstairs, and Copeland returned to his room. The witness stated that after he had returned to his room, he decided to make a check of Holmes' apartment and went back across the hall. Copeland again pushed the door to the Holmes apartment open, and the door lock and splinters from the door fell to the floor. Copeland thereupon enlisted the aid of several other persons and apprehended the defendant who was attempting to flee in the alley behind the apartment building. The police were summoned and defendant was later placed under arrest.

Defendant testified in his own behalf and stated that he resided in the 4400 block of Wabash Avenue in Chicago and that he had been informed by a friend that his sister, whom he had not seen

in over a year, was living in the neighborhood of 48th and Michigan. He testified that he went to that vicinity on the morning in question, entered an apartment building, and questioned an old man concerning the whereabouts of his sister. Defendant stated that the man apparently did not understand what defendant wanted, that the vestibule door to the building was locked, and that he then left the building.

Defendant testified that he proceeded to the building and inquired of a woman, who was leaving the building, if his sister resided there. He testified that the woman told him that someone may have moved in on the second floor and that he went to the second floor to investigate. Defendant testified that he knocked on a door, but received no answer. He then knocked on the door to the Holmes apartment. A girl appeared behind him, but before he had an opportunity to ask her about his sister, the door to the Holmes apartment began to open; when he again turned his attention to the girl who had been behind him she had entered the apartment across the hall.

Defendant testified that the door to the Holmes apartment was opened "hesitantly" by a man wearing a cap and an army coat. He testified that he asked the man if his sister lived in the apartment, and that the man asked him to enter the apartment and to wait a while. The man then left after telling defendant to use a television set to keep the door closed because the door was in disrepair. Defendant testified that he noticed the door lock "hanging precariously" from the door and that there was also some splintered wood on the floor.

After the man left the apartment, defendant placed the television set against the door, as instructed, and began to look through the apartment to determine whether his sister lived there. Finding nothing that would indicate a woman lived in the apartment, defendant testified that he "became uneasy and decided to leave." As he was leaving the apartment, he encountered Copeland in the hall and, in response to questioning by Copeland, told him that Holmes had been in the apartment earlier but that he had since left.

Defendant further testified that he then went to a third building to look for his sister, but that the resident directory was defaced and he decided to try the building across the street. Instead of going to the fourth building, defendant testified that he changed his mind and decided to visit his niece who lived nearby to tell her that he was unable to locate his sister. As he was walking in the alley behind the building in which Thomas Holmes lived, a number of people began hollering and chasing him. He testified that he took a few steps to "gain some room," and was then accosted and held by several people until he was placed under arrest by the police. Defendant denied breaking into the Holmes apartment and further denied entering the apartment for the purpose or with the intent of taking or disturbing anything.

Defendant first contends that he was not proven guilty beyond a reasonable doubt, in that the People failed to prove an essential element of the crime of burglary. He admits that he was in the Holmes apartment for some length of time without the permission of Holmes, but maintains that there was no evidence introduced to show he entered the apartment with the intention of committing a felony or theft on the premises; he directs our attention to the testimony of Holmes that the apartment was not ransacked and that nothing was missing therefrom.

Intent, being a state of mind, may be proved by circumstantial evidence where it is not admitted. People v. Coolidge, 26 Ill. 2d 533, 536. The People's evidence shows that the apartment of Thomas Holmes had been entered by force; that defendant was seen in and emerging from the apartment; that defendant was a stranger to Holmes; that defendant was in the apartment without the permission of Holmes; that defendant, upon leaving the apartment, told Copeland that Holmes was asleep inside the apartment; that a television set was moved from its usual position in the apartment and was also used to hold the door closed; and that defendant attempted to flee when he was later ordered by Copeland and others to stop. Defendant related a different account of the incident, which presented a question of weight and credibility for the trier of fact to resolve; such resolution will not be disturbed on review unless the proof is so unsatisfactory as to justify a reasonable doubt as to the guilt of the accused.

The situation presented here is analogous to that in the case of People v. Bonner, 37 Ill. 2d 553, 562. The court there upheld the defendant's conviction for attempted rape although there was no direct evidence of his intention to commit the rape. The fortuitous interruption of a criminal act, thwarting the completion thereof, does not vitiate the intent to commit that act.

The cases cited by the defendant in support of this position are inapplicable under their facts. See People v. Soznowski, 22 Ill. 2d 540; People v. Hutchinson, 50 Ill. App. 2d 238; People v. Boyd, 17 Ill. 2d 321.

Defendant next contends that certain alleged errors committed during the trial deprived him of a fair trial. He first argues in this regard that the trial court improperly advised the jury that the defendant had the burden of putting on a defense in his own behalf.

It appears from the transcript of proceedings that the People rested their case at 5:30 P.M. on the first day of the trial. Defense counsel then asked the trial judge, "Do you want to keep going?" After a short colloquy between the judge and defense counsel, it was decided that the matter be recessed until the following morning. The trial judge expressed his desire that the jury return early the next morning so that the case could be submitted to it by noon time, to which the defense counsel replied, "Fine." The trial judge thereupon instructed the jury generally, and in part stated:

> "Do not talk about this case to any members of your family, and definitely not to yourselves. You have heard the State's side of the case, plus the opening statements. You have heard [the defense counsel.] And he has a defense which must be put on. Therefore, in order to be fair to both sides, do not talk about it. You will have plenty of time to talk."

When the case was called the following morning, defense counsel moved for a mistrial on the ground that "the defendant...has no obligation to testify or put on a defense in a criminal case, [but that the manner in which the trial judge] has instructed the jury has almost forced me to put my client on the stand."

We are in agreement with the trial court's denial of the defendant's motion for a mistrial for the reason that, as the trial judge stated in response to the motion, the court had been given to believe that defendant would put on a defense and that it was therefore necessary that the jurors be instructed not to discuss the case with anyone since they heard only part of the case. Throughout the verbal cautionary instruction to the jurors the judge referred to the fact that they heard only half the case, and defense counsel in no way responded to those comments. When considered in the context of the entire proceeding the statement made by the trial judge was a passing matter which was in part elicited by the conduct of the defense counsel and which, when taken out of context and emphasized

on appeal, assumes an importance never actually possessed. See Goldstein v. United States, 63 F. 2d 609, 613; People v. Smith, 66 Ill. App. 2d 257, 262.

The situation presented here is not the same as that in Miller v. People, 216 Ill. 309, wherein the trial court specifically commented, upon trial counsel's attempt during the cross-examination of a witness to have him clarify and explain certain statements made by the defendant to which the witness had testified on direct examination, that the defendant was present in the courtroom and that he could answer for himself with regard to the matter.

It is secondly argued under this point that the trial court should not have permitted the prosecutor to read from certified copies of two prior convictions of the defendant in order to impeach his credibility. Defendant generally claims that this practice, although allowed by law, in fact violates the right of an accused to a fair trial before a fair and impartial jury, and cites extensively from treatises and law review articles in support thereof.

It is the settled law in this State that evidence of prior convictions is admissible into evidence for impeachment purposes, where, as here, the accused takes the stand in his own behalf and the jury is instructed as to the purpose of the evidence. Ill Rev. Stat. 1967, Chap. 38, Para. 155-1; People v. Lacey, 24 Ill. 2d 607. The evidence here was offered for the specific and qualified purpose of affecting the credibility of the defendant as a witness and, as such, was properly admitted.

Defendant next contends that the trial court should not have permitted the prosecutor to state, during the final argument, that

the matters which he read from the certified copies of the prior convictions were "evidence upon which [the jury] was to base [their] deliberation." Apart from the fact that no objection was raised to this remark when it was made, the prosecutor later clarified the purpose of that evidence by specifically commenting at length that it was to be considered by the jury solely as affecting the credibility of the defendant.

Defendant finally contends that the prosecutor, again during final argument, improperly expressed his personal opinion as to the defendant's guilt and also neglected to fully inform the jury as to all the elements necessary to establish the crime of burglary. When read in context, it is clear that the prosecutor was explaining all the elements of burglary to the jury and stated to the jury that since the defendant admitted to being in the Holmes apartment without permission, the question of defendant's intention and purpose for being in the apartment was for the jury to determine. The cases cited by defendant on this subject are not in point. See People v. Provo, 409 Ill. 63; People v. Munday, 280 Ill. 32.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

116 I.A. 2nd 343

No. 53228-53229 (Impleaded)

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. STEVEN MITCHELL, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. L. Sheldon Brown, Presiding.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT:

Defendant, Steven Mitchell, along with two other persons, was charged with armed robbery and the murder of McKinley Ross. Defendant, 16 years old, waived a jury trial, and after a bench trial, was found guilty of voluntary manslaughter, and was committed to the Illinois Youth Commission for a term of 5 to 12 years. He appeals, contending that he was not proved guilty beyond a reasonable doubt, or in the alternative, that the sentence imposed was excessive, and should be reduced.

Defendant was also charged with the armed robbery and murder of William McGee, arising out of a separate occurrence. In that case, he pleaded guilty to the charge of voluntary manslaughter, and was committed to the Illinois Youth Commission for a term of 2 to 5 years. He also filed a notice of appeal in that case, and the causes were consolidated. However, with regard to the McGee case, defendant has not filed an abstract or brief, and now concedes that there was no error in that cause, and refers to it only to point out the difference of sentences in the two cases.

As to the McKinley Ross death, the evidence discloses that the deceased, who was 70 years of age, was found by police on June 20, 1967 in an empty, partially excavated lot at 4717 South Michigan Avenue in Chicago. He was unconscious, his head was

bleeding, and he was lying among some stones and bricks. He died on the same day as the result of head injuries which he had sustained.

Larry Lewis, 16 years old, and Emmett Buffman, 12 years old, testified for the State that on June 19, 1967 they were with Larry Napue and defendant at a drug store located at 47th and Michigan. Defendant saw a man (McKinley Ross, the deceased) in the store with money and said that he wanted to get it. When the deceased came out of the store, defendant and Napue climbed up a hill of dirt and stones which had been caused by the excavation of the vacant lot. Defendant threw rocks and bricks at the deceased who was standing on the sidewalk. Deceased fired two shots in the air. Defendant then threw another brick at the deceased, and ran over to where he had been standing. Both witnesses ran from the scene. Defendant was the only person throwing these objects at deceased, but neither witness saw any of the bricks or rocks actually strike deceased. Later defendant showed Lewis a wallet, watch and bag, all of which were bloody. There was a gun in the bag, and defendant displayed the gun to Buffman. Defendant subsequently told Lewis that they hadn't hit the deceased more than twice. Lewis was also charged with murder because of this incident.

The defense consisted of reputation evidence offered in behalf of defendant.

Defendant first contends that he was not proved guilty beyond a reasonable doubt, arguing that the State's evidence was conflicting and unsatisfactory, and that the testimony of an accomplice must be scrutinized carefully.

Defendant was charged with murder, Ill. Rev. Stat. 1965, ch. 38 sec. 9-1, and convicted of voluntary manslaughter, Ill. Rev. Stat. 1965, ch. 38 sec. 9-2, pursuant to the power of the

court to enter a finding on the lesser crime. People v. Gajda, 87 Ill. App.2d 316, 232 N.E.2d 49 (1967).

Although the testimony of an accomplice must be carefully scrutinized, since such a factor does affect credibility, a conviction can be sustained by the uncorroborated testimony of an accomplice if the trier of fact is convinced of guilt beyond a reasonable doubt. People v. Johnson, 93 Ill. App.2d 184, 236 N.E.2d 388 (1968).

In the instant case, two witnesses testified as to the occurrence. Their testimony was substantially the same, and defendant has failed to point out, and we cannot find, any substantial discrepancies or conflicts in that testimony. While neither witness saw any of the objects actually hit the deceased, that fact is of little significance. Both witnesses testified that only defendant threw rocks and bricks at the deceased, and that defendant then ran down to where deceased was. Both subsequently saw bloody items which defendant took from the deceased. Deceased was found in the lot unconscious with his head bleeding, and the only reasonable hypothesis is that he was struck by the objects thrown by defendant. The credibility of witnesses and the weight to be given to their testimony is for the trial court to determine. People v. Williams, 95 Ill. App.2d 421, 237 N.E.2d 740 (1968); People v. Colson, 70 Ill. App.2d 447, 217 N.E.2d 348 (1966). After a careful review, we find that the record supports the trial court's finding of guilty.

Defendant next contends that the sentence imposed was excessive, particularly in view of the fact that he had been committed to a lesser term of 2 to 5 years for the offense of voluntary manslaughter in another cause to which he pleaded guilty.

Defendant was found guilty of voluntary manslaughter for stoning a man to death in order to get his money. After rendering the man unconscious, defendant took his belongings and left him to die. We find that the term of 5 to 12 years for the crime in the instant case, regardless of the penalty imposed upon defendant for any other crime, is not excessive.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY, P.J., and SCHWARTZ, J., concur.

V 116 page 384

53159 **116 I.A. 2nd 384**

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. RAYMOND J. SZYMEZAK, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Jacques F. Heilingoetter, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Raymond J. Szymezak was convicted, following a jury trial, of the offenses of attempt burglary and possession of burglary tools. He was sentenced to terms of two to ten years and one to two years for the offenses respectively, the terms to run concurrently. Four points are raised by the defendant in this appeal: (1) the trial court erred in denying his motion to suppress evidence; (2) the circumstantial evidence presented was insufficient to prove his guilt of the offense of attempt beyond a reasonable doubt (this issue is not raised with respect to the charge of possession except insofar as it follows from the contention that the burglary tools should have been suppressed); (3) statements made by the prosecutor during closing argument were prejudicial; and (4) sentence should not have been imposed on the charge of possession of burglary tools as it is a lesser offense than attempt.

At the hearing held on defendant's motion to suppress evidence the following testimony was heard. The defendant testified that he was walking down the street with a friend when he was stopped by two men. He did not recognize the men as police officers as they did not have uniform caps on their heads. They did not display any paper which purported to authorize them to stop and search the witness, but approached him and his companion with their revolvers drawn. The men searched witness and his companion, took certain items of personal property from them, and arrested them.

Officer Tannehill of the Chicago Police Department testified that on the night in question he and his partner were on duty as part of a task force. They were on patrol in an unmarked police vehicle, but both were in uniform complete with cap. A flash radio message was received which advised of the commission of an attempted burglary, location of the offense, and a description of two suspects. Subject number one was described as male, Mexican or Puerto Rican, dark complexion and wearing dark clothing. Subject number two was described as male, white with very light complexion and a receding hairline.

Fifteen minutes after the message was received, the witness and his partner observed two men, who fit the general description, about four blocks from the scene of the offense. The men were stopped and questioned as to their presence in the area. Each responded that they had been visiting a friend, but neither could supply the alleged friend's name or address. The men were then arrested and searched. A butter knife was found on the person of the defendant and two screw drivers on the person of his companion.

The defendant contends that the trial court erred in denying his motion to suppress the knife and screw drivers since the search which revealed them was incident to an unlawful arrest.

The question of whether an arrest made without a warrant is valid and therefore constitutionally sufficient to support a search incident thereto is answered by a determination of whether there existed probable cause for the arrest. Probable cause for arrest, in turn, exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to warrant belief by a man of reasonable caution and prudence that an offense has been committed and the person arrested is guilty. People v. Hightower,

20 Ill. 2d 361, 169 N.E. 2d 787 (1960); cert. denied 365 U.S. 845, 81 S. Ct. 802 (1961); also see People v. Macias, 39 Ill. 2d 208, 234 N.E. 2d 783 (1968). In view of the testimony of Officer Tannehill with respect to the description received, time and place of the arrest, and defendant's inability to satisfactorily explain his presence in the area, we cannot say that the trial court erred in its determination that probable cause for the arrest existed. It necessarily follows that the trial court did not err in denying defendant's motion to suppress.

The defendant next complains that the evidence was not sufficient to establish guilt beyond a reasonable doubt.

The evidence introduced at trial consisted of the testimony of three witnesses and the knife and screw drivers taken from the defendant and his companion. Elaine P. Kershner, the first witness called by the State, testified that on September 8, 1967, she and her daughter locked and left her garden apartment at 6102 North Damen to have dinner with a relative. Upon returning to her apartment she left her daughter in the car and proceeded toward the rear door carrying a vacuum cleaner. As she approached the door and set the vacuum down, the light in the vestibule to her apartment went on and she observed two men climbing the stairs which led from the vestibule between her apartment and that of her neighbor to the outer door. A light attached to the outside of the building, as well as the street lights, were on and shone on the men as they emerged from the building. One of the men asked her if he could assist her, and when she responded in the negative the men walked a short distance, engaged in a conversation between themselves, and then departed.

The witness, afraid to enter the vestibule alone, stood outside and in a few minutes her neighbor arrived. She then placed her daughter with the neighbor and proceeded through the neighbor's apartment in order to enter her own through the front

door. Noting that her furniture had not been disturbed, she proceeded to the rear door. On that door she noted pry marks, which had not previously existed, indicating that an attempt to enter had been made. After discovering these marks she called the police and gave them a description of the men she had observed on the stairs leading from the vestibule. A short while later the police brought three or four men to her apartment, but they were not the men she had previously observed. Then two other police officers brought two men to the apartment and she identified these men as those whom she had previously seen. The defendant is one of these men.

Finally, she described the area of the building in which she first observed the defendant. Concrete steps lead from the walk to the outer door. Inside that door another stairway leads down to a vestibule. The vestibule is bounded on one side by the stairs, on another by a blank wall, and on the third and fourth sides by doors to her own apartment and her neighbor's apartment. On cross-examination she reaffirmed that she first observed the defendant as he was climbing the stairs which lead from the vestibule to the outer door.

The testimony of Officer Tannehill, the second witness called by the State, was substantially the same as that which he gave at the hearing on defendant's motion to suppress, with the addition that after arresting the defendant and his companion the witness took them first to Mrs. Kershner's apartment and then to the police station.

The final witness called by the State, Detective Richard Bidstrup, testified that he had been on the police force for sixteen years and assigned to burglary for eight years. He further testified that he had examined the rear door to Mrs. Kershner's apartment on the evening of September 8, 1967, and that said examination revealed pry marks on the door and molding

in the area of the locks. Based on his experience it was his opinion that the marks were fresh. No fingerprints suitable for comparison were recovered.

The defendant did not take the witness stand, nor did he present any evidence in defense.

The first offense with which defendant was charged and stands convicted is attempt. Section 8-4(a) of the Criminal Code (Illinois Revised Statutes, Chapter 38, 1965) defines that offense:

> A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

We believe that the record contains evidence sufficient to support the jury's finding of guilt in that (1) the evidence relating to pry marks found on the door (a) indicate that a substantial step was taken toward the commission of the offense of burglary, (b) provide a basis from which intent to commit the offense of burglary may reasonably be inferred; and (2) defendant's presence at the scene immediately prior to discovery of the attempt coupled with his inability to give a satisfactory explanation of his presence in the area, as testified to by Officer Tannehill, provide a substantial basis for finding defendant to have been the perpetrator of the offense.

Defendant's third contention is that certain remarks made by the prosecutor during closing argument were prejudicial. A careful reading of the record reveals that certain of these statements were not objected to at trial and therefore cannot be considered on appeal. The other could not, in our opinion, have operated to the substantial prejudice of the defendant.

Finally, the defendant contends that it was error to sentence him on both counts charged since possession of burglary tools is a lesser offense than attempt. He cites cases supporting

both the theory that when one is found guilty of two offenses, one of which is included in the other, sentence should be imposed only on the greater offense, and the theory that when two offenses are committed through one act or two or more acts which constitute a continuous transaction sentence may be imposed only for the greater offense. Neither theory is applicable here. Possession of burglary tools is not a lesser included offense with respect to attempt burglary since proof of such possession is not necessary to establish attempt. Moreover, there is no element which serves as a common denominator of the offenses.

Likewise the continuous transaction theory relied upon by the defendant is inapplicable here. In each of the cases cited by the defendant one of the offenses charged constituted either a part of, or a substantial step in acts comprising the commission of the other. But it cannot be argued that defendant's possession of burglary tools following the attempt constituted a part of or a substantial step in the commission of the attempt. Conversely, the attempt was not a part of or substantial step toward possession as that term is defined in section 4-2 of the Criminal Code:

> Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

116 page 418

53733 116 I.A. 2nd 418

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiff-Appellee,	)	
vs.	)	
COYNTEE WILLIAMS,	)	HONORABLE FRANK J. WILSON Presiding
Defendant-Appellant.	)	

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

In a jury trial the defendant was found guilty of burglary and was sentenced to a term of ten to twenty years in the Illinois State Penitentiary. On appeal defendant argues that he was not proved guilty beyond a reasonable doubt and that the trial court's refusal to give three instructions tendered by defendant constituted reversible error.

Defendant failed to abstract all the instructions which had been given and refused, and merely set out the three instructions which he asserts should have been accepted by the trial court. As we pointed out in Rowlett v. Hamann, ___Ill. App. 2d ___[No. 52862], no instructions, given or refused, were abstracted; the defendant made no "good faith effort" to comply with Supreme Court Rule 342(g). In spite of that fact, we have examined the instructions in the record and find that the court did not commit reversible error in denying the instructions offered by defendant inasmuch as the instructions in the record adequately covered the matters set out in the instructions offered by the defendant.

We also feel it is worthwhile to call attention to People v. Daily, 41 Ill. 2d 116, 121, opinion filed November 22, 1968, after the adoption of the Supreme Court rule.

Concerning defendant's contention that he was not proved guilty beyond a reasonable doubt, we will consider the following facts. Irving Tropstein, who owned a furniture store with his brother at 1515 West Madison Street, Chicago, Illinois, testified that when he left the premises on April 11, 1968, the store front was in good condition; that at 4:00 a.m. on April 12, he received a telephone call informing him that the store had been burglarized. When he arrived at the store he saw that two large plate glass windows in the front were broken and some of the furniture in the window had been moved around. At the police station he identified a television set as one which had been in his store.

Newton Hockenbury testified that at 4:00 a.m., on April 12, as he was leaving the bar at 1535 West Madison Street, where he worked as a bartender, he saw three men taking furniture out of the broken window of the furniture store next door and carrying it out to a car. He stated that he walked past the men as he went to his hotel, then came out again and noticed that the men had a television set. He could not positively identify the defendant as one of the men picking up the television set, but did definitely state that he saw the defendant with a chair in his hand, ready to put it in the car. He further testified that as he was watching the men with the television set, the police arrived and arrested the three men. The television set was also taken to the police station where Tropstein identified it.

The defendant testified that he had committed no burglary; that he had been drinking with a friend and was walking past the furniture store when he saw a man break the window and remove some items from the store. He stated that he and two other men were walking down the street when the police arrived and ordered them to stand near a fence and place their hands in front of them. He further testified that he had seen two men carrying a television set, and that they got into an automobile and drove away, leaving the set behind.

Defendant's story is contradicted by the testimony of witness Hockenbury who said that the men who were lugging the television set were the same ones caught by the police, and Officer Cottini testified that one of those men was defendant Williams.

The credibility of witnesses is to be determined by the trier of fact, and these findings will not be disturbed unless the evidence is improbable or unsatisfactory. In People v. Reynolds, 27 Ill. 2d 523, the court said at 525:

> "Evidence of recent, exclusive and unexplained possession of stolen property by an accused, either singly or jointly with others, may, of itself, raise an inference of guilt absent other facts and circumstances which leave in the mind of the jury a reasonable doubt as to guilt."

And in People v. Peto, 38 Ill. 2d 45, the court said at page 49:

> "It is the province of the jury to determine the guilt or innocence of the defendants and its judgment will not be set aside by this court unless it is palpably contrary to the weight of the evidence or so unsatisfactory as to justify a reasonable doubt of defendant's guilt."

In the matter before us the State presented a strong case closely linking the defendant as one of those participating in the burglary. We must consider the fact that the evidence establishes that the defendant, with two other men, was in recent, exclusive and unexplained possession of stolen property. This alone would justify a finding of guilty. People v. Reynolds, supra; People v. Garrett, ___Ill. App. 2d ___[No. 52179].

The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

116 I.A. 2nd 419

53975

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIAM A. BATHURST, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE ARTHUR L. DUNNE Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

This case arose out of the disturbances in Chicago, Illinois, during the Democratic National Convention of 1968, and the scene of the alleged crime was around the General Logan statue in Grant Park. The defendant was charged with battery "in that he knowingly and intentionally . . . , caused bodily harm [when he] struck with camera left shoulder [of] Sergeant Thomas Finnin, in violation of chapter 38, § 12-3(a)(1) . . . " The complaining witness was Police Sergeant Thomas Finnin.

In a bench trial the defendant was found guilty and fined $250. On appeal he argues that he was not proved guilty beyond a reasonable doubt, and that the State failed to make an adequate showing of bodily harm, therefore failing to prove that a battery had in fact occurred.

The State's case was based solely on the testimony of Sergeant Finnin, who testified that on August 26, 1968, at about 4:30 p.m., a group of demonstrators he and other officers were escorting suddenly ran into Grant Park and climbed onto the General Logan statue. The unruly crowd continued to increase in number, and

there was some scuffling between them and the police. Forming a line around the statue, Sergeant Finnin and ten other officers ordered the crowd to disperse. The officer testified that the crowd again started to surge forward and he was struck in the back with "something sharp, it was something metallic, . . . it wasn't a fist." He stated that the blow caused him to fall forward, apparently tripping over a small lip at the base of the statue; that "as I stumbled over this lip and down the incline I turned to see what happened and I observed him [defendant] standing there. At that time he was in a position that I felt he was the only one that could have done it." He added that the defendant had a camera in his hand and was backing away, taking pictures; that because of the pressure of the crowd and the efforts of the police to restore order, the defendant was not immediately arrested.

On cross-examination the officer explained that several seconds elapsed from the time he was struck until he was able to turn and see what had struck him; he said, "There were people in front of me, behind me mostly were policemen and a couple of people that I knew." He stated that there was much confusion and moving about. He testified that he had not required medical treatment for the injury, and when asked if he had suffered bodily harm, he said, "Well, no bodily harm, no, there was a striking, a hitting."

At this point the State closed its case and the defendant moved for acquittal on the ground that the State had failed to make out a prima facie case of battery because of insufficient evidence of the requisite intent;

that the defendant had not been adequately identified as the assailant; and that there was insufficient proof of bodily harm to justify a conviction for battery. The court denied the motion and the defendant proceeded with the case, consisting of the testimony of a bystander, Stephen Lerner, and that of the defendant. It is not necessary to set out in detail the testimony since our decision will rest upon an evaluation of the evidence introduced by the State. However, we must note that both the defendant and the witness in his behalf denied that there was any assault upon or pushing of the officer by defendant.

When the State rested, the question before the trial court was whether it could find the defendant guilty at that point if no evidence were introduced by the defendant. From the record it is apparent that the question should have been answered negatively by the trial court and the defendant's motion for acquittal should have been allowed.

We will first consider the question of whether defendant was adequately identified. Officer Finnin testified that after he was struck in the back he had not actually seen who hit him; that he turned around seconds later and saw the defendant backing away, taking pictures. The officer then concluded that the defendant was in a position of being the only one who could have hit him. However, he had also testified to the large and unruly crowd constantly increasing in size, and that there was confusion at the scene with the crowd surging forward just before he was struck. He admitted that there were others behind him, but that they were mostly people he knew.

Here it is worthy of note that the officer had not expressly asserted that the defendant was the only person behind him whom he did not know. Furthermore, it would seem highly unlikely that in this period of extreme confusion and physical activity, the officer could have accurately observed every person behind him. This conclusion is supported by the officer's own testimony that he did not immediately place the defendant under arrest because the crowd came between them. It would thus appear that the officer had no more than a fleeting glimpse before the surging crowd cut off his view. Under those circumstances we do not feel that the identification was sufficient to sustain a criminal conviction and that it was not proved beyond a reasonable doubt that it was the defendant who struck the blow.

We must consider that no one testified he had actually seen the defendant strike the officer; and while there is no rule of law requiring an identification by an eyewitness, the State must still prove beyond a reasonable doubt that the defendant committed the battery. The police officer has only testified that, based on the defendant's position, he felt it was he who had struck him with something he thought was metallic, and since the defendant had a camera in his hand, it was probably that which struck him.

The proof in the case is entirely circumstantial. In People v. Wilson, 400 Ill. 461, the court said at page 473:

> "In cases where the proof is entirely circumstantial, if there is any reasonable hypothesis arising from the evidence, consistent with the innocence of the defendant, it must be adopted. It is essential to a conviction upon circumstantial evidence that the facts proved be not only consistent with the defendant's guilt, but that they be inconsistent, upon any reasonable hypothesis, with his innocence. People v. Holtz, 294 Ill. 143."

In our opinion the State has not met the burden of proof placed upon it in the instant case.

Under all the circumstances we do not feel that the State has identified the defendant as the person who committed the battery upon the officer. The evidence introduced by the State only points out that the defendant could have struck the officer. The sergeant's testimony as to identification is not sufficient, and the trial court should have allowed defendant's motion for an acquittal at the close of the State's case.

In its brief the State argues that the question of credibility of witnesses is for the trier of fact, and while we have no quarrel with that position, the question before us is whether a case had been proved even if the trial court had believed the State's evidence.

In view of our conclusion it is not necessary to discuss in detail the question of whether or not defendant had been proved guilty of violating section 12-3(a)(1) of chapter 38, Ill. Rev. Stat. 1967, which provides:

> (a) A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual . . .

Concerning the question of whether defendant had been proved guilty of the alleged charge of violating the cited section, without going into detail as to the

interpretation of the statute, it would seem that if the party allegedly injured states he suffered no bodily harm, the court must accept his conclusion as the fact.

The judgment of the Circuit Court is reversed.

REVERSED.

LYONS, P.J., and BURKE, J., concur.

116 page 419

No. 51898 116 I.A. 2nd 419

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LEON WALLS and JAMES PAYNE, Defendants-Appellants.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Edward J. Egan, Presiding.

MR. JUSTICE MC NAMARA DELIVERED THE OPINION OF THE COURT.

Defendants, Leon Walls and James Payne, were charged with attempted robbery. After a bench trial, they were both found guilty and sentenced to a term of 4 to 8 years in the penitentiary. On this appeal, defendants contend that they were not proved guilty beyond a reasonable doubt. The facts follow.

Willie Alsup testified that he and his wife were sleeping in a public park in the City of Chicago on the morning of July 10, 1966. They arrived at the park on the previous evening at about 10:00 p.m. At about 4:00 a.m., he was awakened by a voice asking him for a cigarette. He saw two men he had never previously seen, and one of them announced that this was a stickup. He was hit on the head, and one of the men was trying to take his gun away from him. During the struggle, the gun went off and defendant Walls was shot. Defendant Payne ran over to Walls, and about that time, some police officers arrived at the scene. Alsup also testified that he told the police that it was his gun, and did not tell them that he took it away from one of the robbers. He drank only a bottle of beer during the previous night.

Lucille Alsup, Willie's wife, testified that she and her husband were sleeping in the park when two men came up to them and asked for a cigarette. Defendant Payne then announced that

this was a stickup. A few moments later, one of the men struck her husband on the head with some instrument. They started struggling, and her husband's gun went off, injuring Walls. The two men ran, and she saw the police chase them. She heard three shots fired, but only one came from her husband's gun. She also heard her husband tell the police that he had taken the gun from one of the robbers. During the entire evening, she and her husband drank about a pint of whiskey between them.

Two Chicago police officers testified that they were in the park, when they heard a gun shot. One of the officers fired his gun in the air. They turned on the squad car spotlight, observed some people struggling, and then defendants attempting to run away. Two other persons did flee. Alsup was bleeding from the head, and Walls was shot and bleeding from the leg. The officers searched the scene and found a gun and also a hammer without a handle and with blood on it. It was later determined that one shot had been fired from the gun. The officers took the Alsups and defendants to a hospital. At the scene, all of the parties denied ownership of the gun. On the way to the hospital, Alsup stated that five persons had attempted to rob him. At the hospital, Alsup told the police that he did not remember what he had said at the scene, but the gun was his. Both officers also testified that, although Alsup had been drinking and seemed to be groggy from the blow on the head, he was not intoxicated. Mrs. Alsup did not appear to have been drinking.

Defendants testified that, with friends, they had been drinking all night. At 4:00 a.m. they bought some wine, and went to the park to drink it. None of them had any cigarettes or money, so Walls walked over to awaken Alsup, who was a stranger, in order to ask for a cigarette. Alsup immediately fired

two shots, striking Walls in the leg. Payne ran over and struck Alsup with a wine bottle to prevent him from killing Walls.

During Mrs. Alsup's testimony, the trial judge ordered Alsup from the courtroom, indicating that Alsup was under the influence of intoxicating liquor. The trial judge also stated that Mrs. Alsup was the only credible witness to all the events that took place.

The sole issue on appeal is whether defendants were proved guilty of attempted robbery beyond a reasonable doubt. Defendants argue that the evidence presented by the State was unsatisfactory and in conflict. Defendants note that Mrs. Alsup testified as to Payne's statement that this was a stickup only on cross-examination, that the police did not learn of the robbery attempt until after leaving the scene, and that Alsup originally denied ownership of the gun.

A reviewing court will disturb the trial court's finding of guilt only if the evidence is so unsatisfactory and conflicting that it creates a reasonable doubt. People v. Cooper, 69 Ill. App.2d 18, 216 N.E.2d 168 (1966). Moreover, the credibility of witnesses is for the trial court to determine, and that determination will generally not be disturbed on review. People v. Pendleton, 75 Ill. App.2d 314, 221 N.E.2d 112 (1966).

We find that there was ample evidence to support the conviction. The trial court found that Mrs. Alsup was a credible witness, and defendant has not pointed out, nor have we been able to find, any discrepancies or inconsistencies in her testimony. We do not see how her credibility could be affected by the fact that she testified only on cross-examination as to Payne's statement that this was a robbery. Additionally, her testimony was corroborated by that of the police officers. The officers testified that the husband was bleeding, that defendants attempted to flee, and that they saw two others successfully

escape.

Defendants urge that it was strange that the police officers did not learn of the attempted robbery until after leaving the scene. In view of the fact that Alsup and Walls were injured, and the officers' testimony that they were concerned with transporting them to the hospital, we do not consider this such a deficiency as to cast doubt on the credibility of Mrs. Alsup's testimony.

Although one of the police officers and Mrs. Alsup testified that, at the scene, Alsup denied possession of the gun, the officer also testified that Alsup was groggy and dazed, and that at the hospital he admitted ownership of the gun. This impeachment affected only Alsup's testimony, and in fact, was further indication of the credibility of the wife's testimony.

The trial judge obviously did not believe defendants' testimony, and upon the basis of the record, we will not disturb that finding. According to their version, Walls attempted to borrow a cigarette in a public park from sleeping strangers at 4:00 a.m., while Payne and other friends waited a short distance away. Such an explanation was not so reasonable as to require belief on the part of the trial court.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY, P.J., and SCHWARTZ, J., concur.

116 I.A. 2nd 438
No. 68-61

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EVA REAK, Plaintiff-Appellant, -vs- FIRST STATE BANK OF ELIZABETHTOWN, An Illinois Corporation, DOROTHY BARNERD and TROY BARNERD, Defendants-Appellees.	Appeal from the Circuit Court of Hardin County, Illinois. Honorable Randall S. Quindry, Judge Presiding.

George J. Moran, J.

A declaratory judgment action was instituted wherein the plaintiff, Eva White Reak, alleged in Count I that the defendants, Troy and Dorothy Barnerd, were her relatives and that some time prior to March 9, 1966, Dorothy Barnerd visited the plaintiff while she was a patient in a hospital and invited the plaintiff to stay at the Barnerd home during her convalescence. Count I further alleged that on or about March 9, 1966 Dorothy Barnerd took the plaintiff to the defendant bank and caused and induced the plaintiff to surrender her United States Savings Bonds and cash them in; that Dorothy Barnerd caused the bank to issue a savings certificate in the amount of $10,000.00 in the name of Troy or Dorothy Barnerd, and that unknown to the plaintiff, the plaintiff's money was used to purchase the certificate; that the plaintiff had no intention of making any gift nor did she intend that the Barnerds would have any beneficial interest; that there was no consideration flowing from the Barnerds to the plaintiff; that upon subsequent discovery the plaintiff asked the bank to re-issue the certificate in her name and that the bank refused to do so and that the Barnerds have refused to endorse the certificate back to the plaintiff; and that the plaintiff was ill and incapable of understanding the transaction and that th plaintiff placed great trust and confidence in Dorothy Barnerd and that the Barnerds are thus trustees of the certificate.

Count II alleged a material mistake of fact upon the part of the plaintiff going to the essence of the contract and that there is no contract because of a

lack of mutual assent; that the certificate be cancelled and held null and void and that the bank be ordered to rescind the certificate and return $10,000.00 to the plaintiff.

The trial court entered judgment for the defendants and against the plaintiff and the plaintiff appeals.

The plaintiff, Eva White Reak, age 85, was admitted to a hospital on January 26, 1966. The treating physician diagnosed her condition as probable anemia and possible cerebral insufficiency, or an insufficient supply of blood to the brain. The doctor testified that the hemoglobin count was about one-fifth of normal. The doctor further testified that the plaintiff was not in proper contact with reality at the time of admission or for a few days thereafter, but, at the time of her discharge (February 2, 1966), she appeared to be rational.

Upon discharge from the hospital, the defendant, Dorothy Barnerd, took the plaintiff to her home. At this time the plaintiff's husband was evidently recovering from a stroke and was living in another town. The plaintiff testified that when Dorothy visited her at the hospital, she told Dorothy that she was trying to get somebody to go home with her in order that she might ready the home for her husband's return. At this time Dorothy Barnerd invited the plaintiff to come to her home. Dorothy's husband, Troy Barnerd, is a nephew of the plaintiff. The plaintiff accepted the offer and went to the Barnerd home on February 2, 1966.

Five days later an attorney, representing the defendant bank in the instant action, was called to the Barnerd home and retained by the plaintiff to institute divorce proceedings against Roy Reak. At some earlier date the Reaks had entered into a post-nuptial agreement which provided that in consideration of the sum of $1,000.00, the husband waived all rights to his wife's real and personal property. A divorce proceeding was initiated and on March 4, 1966, Mr. Reak filed a counterclaim asking for provisions for separate maintenance and support. At some later date the parties were reconciled and Mr. Reak died on February 2, 1967.

The plaintiff testified that on March 9, 1966 Dorothy Barnerd drove her to the Rosiclare Bank where the plaintiff had done her banking for a number of years. It has been the plaintiff's practice to keep her valuables in a metal box, similar to

a fishing tackle box. This box was kept at the Rosiclare Bank. The cashier, Mr. Frazier, would prepare her checks for paying bills, since her eyesight was failing, and he would then show her where to sign. The plaintiff stated that on March 9, 1966, Mr. Frazier told her she would have to remove the metal box from the bank premises because the law would not allow him to keep it. She stated that Mr. Frazier also said there were no safety deposit boxes available; that Dorothy Barnerd then said that she and Troy had money in the defendant bank and that they could take the box there.

The evidence disclosed that the box contained approximately $32,000.00 in bonds. The plaintiff testified that Dorothy drove her to the First State Bank of Elizabethtown, where they were met by Mr. Jack Holbrook, the bank's cashier. Mrs. Reak testified that Mr. Holbrook took her metal box, opened it and took out some of the contents. She also stated that she was weak and felt that she was going to black out; that she felt sick while sitting at the desk and that they would lay someth down and say, "Sign this." She stated that she does not have the slightest idea what she signed.

The plaintiff testified that she rented a lock box from Mr. Holbrook, paid $3.00 for it and received the keys from Mr. Holbrook. Mrs. Reak then returned to the Barnerd home, continued to reside with them until some time in May, and then went to her own home.

Mrs. Reak also testified that on October 27, 1966 she told her brother, Dr. Birch, that something was troubling her and that she wanted to go to the bank. She said that she had possession of the keys to the box since March 9, 1966; that she presented these keys to Mrs. Lloyd, the assistant cashier, who opened the box, and that Dr. Birch then found the certificate in the box.

Dr. Birch testified that after he discovered the certificate, Mr. Holbrook entered the bank and when asked about the certificate, replied that Mrs. Reak gave it to Troy and Dorothy Barnerd. The doctor stated that the plaintiff immediately denied that she had given the certificate or money to anyone. The doctor also testified that Mrs. Lloyd said, "Oh, Mrs. Reak, you were not physically -- you

were too sick to be doing any business." (Referring to the transaction of March 9, 1966.) The doctor said that he then gave the certificate and keys to Holbrook and told Holbrook to keep them since there probably would be legal proceedings.

The bank records show that the box was rented on March 9, 1966 in the names of Troy Barnerd or Dorothy Barnerd, and that the signature of "Troy Barnerd" (admitted to have been signed by his wife, Dorothy) was entered on 3/9/66, 3/19/66 and 4/16/66; the signature of Eva White Reak on 10/27/66 and 2/20/67; and the signature of Dr. Birch on 12/1/66.

Dr. Birch stated that when he went to the bank on December 1, 1966, he told Mr. Holbrook that he had a power of attorney, that he thought the certificate should be returned to the box, and asked the cashier to get the certificate and keys, which the cashier did. The doctor said that he again went to the bank with his attorney and told Mr. Holbrook that they had come to take the certificate, but that they were refused admittance because the Barnerds had given notice that no one was to enter the box. He also testified that sometime after discovering the certificate, he went to the Barnerds and presented a contract which would give them $1,000.00, provided they would release the certificate and have it re-issued in the plaintiff's name.

Mrs. Florence Lloyd, the Assistant Cashier, testified that when she saw Mrs. Reak come into the bank on March 9, 1966, she was holding onto Dorothy's arm. She testified that the bank requires that each person sign the contract in his own name on a joint box account. She further stated that on October 27, 1966 when the plaintiff was advised of the certificate, the plaintiff said, "I don't remember a thing about it." This witness, when asked whether Mrs. Reak understood the nature of the transaction of March 9, 1966, replied, "She was too old to be doing the kind of business she was doing." However, this witness also stated that the business was transacted in the back office and that she does not know what occurred in that office.

Mr. Holbrook testified that the plaintiff and Dorothy Barnerd came into the bank on March 9, 1966. He stated that Mrs. Reak desired to cash her bonds and that in his and Dorothy's presence, Eva Reak asked him to issue a savings

certificate for $10,000.00 in the name of Troy or Dorothy Barnerd. He had the certificate issued and gave it to Dorothy who then gave it to the plaintiff. This witness testified that the plaintiff then pushed the certificate across the table to Dorothy and said: "This is for you and Troy Barnerd." He also stated that Mrs. Reak initiated the conversation regarding the certificate and that Dorothy had said nothing. Also, he testified that the rental of $3.00 was paid by Dorothy and that he gave her the keys to the box. It is noted that throughout his testimony, he was impeached many times.

Dorothy Barnerd testified that the plaintiff wanted to cash her bonds so she would not have any assets in her name, because she had been countersued by her husband. This witness stated that upon arriving at the defendant bank, the plaintiff told Mr. Holbrook that she had bonds which she wanted to cash. She further testified that the plaintiff handed her the certificate and said, "That's for you and Troy." She also testified that she paid the $3.00 rental and received the keys. Dorothy Barnerd testified that when her husband arrived home, the plaintiff said that she had taken care of them; had just given them $10,000.00. She also testified that she kept the keys in a dresser drawer in the room where plaintiff slept and noticed that the keys were missing two days after the plaintiff returned to her own home.

Troy Barnerd testified that on March 9, 1966 the plaintiff told him that she had given him $10,000.00, that he was to keep his mouth shut and she would do the same.

Mr. Frazier, the Cashier of the Rosiclare Bank, testified that the plaintiff and Dorothy Barnerd came to his bank and that Mrs. Reak asked for her metal box. The plaintiff told him she had been countersued by her husband and wanted to get her bonds into cash.

Numerous other witnesses testified regarding the plaintiff's inability to see, and there were many character witnesses, both pro and con, relating to the general reputation of the defendant, Dorothy Barnerd, for truth and veracity.

The trial court, in ruling for the defendants, stated in part:

> "Now the question is as to the Bank first: What does the evidence show? Well, I don't think the Bank could be held under any circumstances for this reason. Now I am fully aware of Mr. Holbrook's

evidence which is impeached in a number of cases. Now I am a little disturbed about the fact that Mr. Holbrook's evidence was so conflicting between the time of the taking of the deposition in December and the time that he testified here this week. I don't think that it was intentional. I don't think it was malicious. I don't think that it was a thing that he gave much consideration to. At least it lends some doubt as to the accuracy of other statements he might make to the court, the fact that he didn't even remember on these occasions. Now giving no consideration however to any of his testimony, except what is supported by the facts and what is supported by other competent evidence of testimony, I think we can rightfully conclude that the transaction in the bank was made. That the box was issued to the defendants in this case, the Barnerds; because not his testimony alone but the transaction itself, the receipt which was written out on the application, the card filled out on that date and the keys according to the testimony delivered to the Barnerds. Now, there's a conflict there. I remember that; but I think that there's no question but what it is the Barnerds' box. Now, the question as to whether or not it was properly handled, I'll agree that the Bank was in error in allowing others to enter the box. Certainly Dr. Birch had no right to get in that box and certainly Eva Reak had no right to get in that box under the circumstances. It was assigned to one person and that was the only person entitled to it, and but by the same token, the only people who can object and complain are the Barnerds because it was their box. I think there is no question about it. So, I think that takes care of that.

Now let's see what the evidence is as to the mental capacity of this donor. There's only two questions actually involved here: One of them is, as I see it: What was the mental capacity, did she have the capacity to make a gift and was it clear and convincing evidence of that capacity. Secondly, did she make a gift and thirdly, of course, is did the evidence support that and I think that there is no question but what her condition on that particular day, the evidence shows that she was competent on that date. Now what her condition was a week before, Dr. Duffey I think testified that she wasn't completely rational at times when she first came to the hospital. At the time she was discharged, I think he said she understood what she was doing and she was I am sure understood the nature and effect of her transactions but, now even that date wouldn't be in control. The date that is controlling is the date upon which the transaction was made. Now did she have the intent? Well, she went to the Bank the evidence shows at Roseclare, I believe on the 8th, and expressed to the Cashier of the Bank some interest in converting her bonds into cash because of a pending lawsuit, divorce, I believe. Second, she went back on the 9th, a day later, still with the same intent, picked up the box. There is a question whether she carried it or whether Mrs. Barnerd carried it. I don't think it is important. It goes under the procedures in the past. When we have juries, sometimes lawyers will imply that the witness doesn't know what they were doing because they don't remember who had the box or how much they paid for the lock box. Well, those are things that a lot of people forget. I have two lock boxes and I don't know how much I paid for either one of them, but I feel that I have a fair mental capacity and I don't think that is the controlling factor here. Now a business transaction that one person might make today, to that same person might seem absurd tomorrow. Maybe Mrs. Reak feels today that this was a stupid mistake if she remembers, and I think she does, to give this money away. Well, perhaps we have made transactions ourselves that might look awkward to us later on, but by the same token, the inconsistency of the thing is if she was incapacitated on that date, just a few days or a few months later that Dr. Birch took her power of attorney which Mr.

> Harris pointed out and operated, only a short time later she made a will. She went to a dentist to have a will made. Now that in the minds of some people look like an act of incapacity but to him, Dr. Birch, I am sure thought it was rational and to her it apparently seemed rational; but to the average lawyer it would seem like an irrational act. To a laymen , maybe it isn't. I wouldn't go to Mr. Quarant's office to have my teeth filled nor would I go to Dr. Birch's to have him draw my will. But that is neither here nor there. It is an act that's inconsistent. So it will be the finding of the Court that the relief will be denied the plaintiff and the Certificate awarded to the defendants."

The plaintiff contends that the trial court erred in denying the plaintiff's motion to prevent the State's Attorney of Hardin County from representing any party in the lawsuit. He represented the defendant bank. The plaintiff's motion stated that his duties as State's Attorney were in conflict with the representation of the bank.

Chapter 14, Section 7, Illinois Revised Statutes (1967) provides:

> "The State's attorney shall not receive any fee or award from or in behalf of any private person for any services within his official duties and shall not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend."

The plaintiff contends that the facts alleged were sufficient to describe the crimes of theft, deception and obtaining money and property under false pretenses. In addition, the plaintiff raises the issue that if Mr. Holbrook, who was impeached on several occasions, had been cited for contempt, there would be no one who could prosecute. As to the contempt issue, this same potential problem could, of course, be present in any civil suit and thus preclude state's attorneys from representing any party in a civil suit. The statute obviously does not indicate such a legislative intent.

This statutory provision concerning State's attorneys' participation in civil matters was considered in People v. Kidd, 401 Ill 230. In that case the State's Attorney filed a will for probate for the executor and heirs of the deceased. Then, other parties filed another will which gave the property to them. In the trial of the matter it was determined that a forgery had been committed. The Supreme Court held that the civil proceeding preceded the criminal proceeding and there was nothing to indicate that a criminal case would arise. We believe that the same rule can be applied to the instant action. Although it is possible that criminal proceedings could follow, it certainly was not indicated that any criminal action would arise.

The plaintiff also contends that in their answer, the bank and the Barnerds claimed to have no personal knowledge or information sufficient to form a belief as to the truth of the allegations in the complaint, but that they failed to attach an affidavit of such lack of knowledge in violation of the Civil Practice Act, Chapter 110, Sec. 40(2), Ill. Rev. Stat. (1967). In addition, it is contended that the defendants' denial in their answers that the plaintiff's money was used to purchase the certificate constituted a denial made without reasonable cause and not in good faith, in violation of Section 41 of the Civil Practice Act, which subjects the party so pleading to the payment of reasonable expenses.

The failure of the defendants to attach an affidavit as required by Section 40 of the Act was not raised at the trial level and cannot now be raised for the first time on appeal. Also, the merits of the contention relating to a violation of Section 41 need not be considered, since a petition to recover such costs must be filed within thirty days after entry of judgment. Eugene Matanky & Associates, Inc. v. Onixt, 219 NE2d 865.

In relation to the transaction involving the issuance of the savings certificate, the plaintiff raises several points relating to the subject of gifts. The plaintiff contends that there existed a fiduciary relationship between Mrs. Reak and Dorothy Barnerd, and therefore the burden of proving a gift was on the donee and that the proof must be clear and convincing; that the claim of gift rested solely on the uncorroborated claim of Dorothy; that there was no delivery to Troy Barnerd; that the plaintiff failed to understand the nature and effect of the transaction.

Since there was obviously not a fiduciary relationship as a matter of law, under Count I of the complaint plaintiff was obligated to first present evidence of the existence of a confidential or fiduciary relationship by proof which is so clear, convincing, strong, unequivocal and unmistakable as to lead to but one conclusion. Landau v. Landau, 20 Ill 2d 381, 170 NE2d 1; Lux v. Lelija, 14 Ill 2d 540, 152 NE2d 853; Kapraun v. Kapraun, 12 Ill 2d 348, 146 NE2d 7; Kolze v. Fordtran, 412 Ill 461, 107 NE2d 686; Compton v. Compton, 414 Ill 149, 111 NE2d 109; Maley v. Burns, 6 Ill 2d 11, 126 NE2d 695. In case such a relationship is properly

established the burden of proof then rests upon the defendant to vindicate the gift by showing it was perfectly fair and reasonable in every respect, (White v. Smith, 338 Ill 23, 26, 169 NE 817, 818), or as was said in Gilmore v. Lee, 237 Ill 402, 411, 86 NE 568, 570, that if a gift is made to the person in whom confidence is reposed by reason of the relationship, it is prima facie void, and the burden of proof rests upon the donee to show it was the free and voluntary act of the donor.

What constitutes a fiduciary relationship has been discussed many time in the decisions handed down in our courts. In Carroll v. Caldwell, 12 Ill 2d 487, 495, 147 NE2d 69,73, the court said:

> " . . . It is settled law that courts of equity will not set any bounds to the facts and circumstances out of which a fiduciary relationship may spring. (Fisher v. Burgiel, 382 Ill 42). . . . 'The fiduciary relationship with its legal incidents includes not only all legal and technical relations . . . , but it extends to every possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other.'"

The rule itself is simple. The application of the rule to any given set of facts is difficult. What constitutes a fiduciary relationship when the relationship does not exist as a matter of law depends upon the circumstances of the case.

In its judgment order the trial court found: (1) The plaintiff, on March 9, 1966, had the mental capacity to understand the nature and effect of the transaction; (2) the idea of a gift originated with the plaintiff; (3) the plaintiff was under no influence or domination of either of the defendants; and (4) the gift was freely and gratuitously made by the plaintiff to the Barnerds.

We also believe that the delivery was sufficient as to both donees. The delivery of the property must be such as to vest the donee with control and dominion over the property and to divest the donor of all present and future dominion over the subject matter of the gift. In re Waggoner's Estate, 5 Ill App 2d 130 (1955). It is not necessary that a manual delivery of the money be made. The gift is perfected when the donor places in the hands of the donee the means of obtaining possession of the contemplated gift, accompanied by the requisite intent to divest herself of all dominion and control over the property. In this case,

delivery of the certificate by Mrs. Reak into the hands of Dorothy Barnerd was sufficient delivery since it provided Dorothy and Troy Barnerd with the means of obtaining the money. In addition, Mrs. Reak had relinquished all dominion over the money since she could not withdraw the money without returning the certificate indorsed by either Troy or Dorothy Barnerd. Consequently, the fact that the bank permitted Mrs. Reak access to the safety deposit box even though not registered in her name, does not invalidate the delivery.

As to the delivery to Troy, the question whether the gift was thereby completed without actual delivery to him depends upon whether Dorothy received the certificate as the donor's agent or as trustee for the donee. In re Estate of Meyer, 317 Ill App 96, 102 (1942).

If the certificate was delivered to Dorothy as agent for Mrs. Reak, then the gift was revocable and incomplete until actual delivery of the certificate or money was made to the donee; but if it was delivered to Dorothy as trustee for the donee, then such delivery is deemed, in law, delivery to the donee, and divests the donor of all control or right or title in the property, and the gift is irrevocable. In re Estate of Trapp, 269 Ill App 269 (1933). In that case the court said at 273:

> "The law seems to be well settled that where a person understandingly and clearly makes evident a purpose to present others with personal property, and in consummation of the purpose, delivers same to a third party for the benefit of the intended donees, relinquishing all dominion and control over the property, the person to whom the delivery is made, in the absence of controverting circumstances, is regarded, in law, as trustee for the donees, and not as agent of the donor; and where, in addition, as here, the person to whom the delivery is made is one of the beneficiaries, and receives the deposit as trustee, coupled with an interest, it follows that he takes and holds the property as trustee for the donees."

Since the trial court found that the plaintiff freely, voluntarily and understandingly gave the certificate in question to Troy Barnerd and Dorothy Barnerd, and since there was an evidentiary basis for the trial court's finding, and since Dorothy Barnerd was one of the beneficiaries at the time of the delivery, it follows that she received the certificate not only for herself, but as trustee for Troy Barnerd.

In addition, we believe that the evidence was sufficient to support the trail court's finding that the plaintiff understood the nature and effect of the transaction. The doctor testified that at the time of her discharge from the hospital she was rational. She made a decision to file a divorce action and, according to Dorothy Barnerd and the Cashier of the Rosiclare Bank from which she removed her money, she was aware of the countersuit filed by her husband and wished to transfer her bonds into cash. Although the plaintiff stated that she knew nothing of what occurred at the bank, we note that on October 27, 1966 she told her brother that something was bothering her and she wanted to go to the bank. This occurred despite the fact that she knew nothing of the transaction on March 9, 1966, or had ever heard anything about it.

An elderly person such as the plaintiff may be susceptible to undue influence, but the plaintiff did not sustain her burden of proving that such influence had been exercised. Although Mr. Holbrook was impeached on several points, there was not sufficient evidence that he and Dorothy Barnerd conspired to influence the plaintiff into making the gift. There was also the unusual practice of allowing several people admittance to the safety deposit box. The box was issued in the Barnerds' names, but the belongings of the plaintiff were also deposited in the box. This may explain the bank personnel's reason for allowing others admittance to the box. In any event, this unusual practice does not affect the issue of whether a gift was made.

The decision of the trial court involved the weighing of conflicting and inconsistent testimony. The court heard the testimony, observed the witnesses, and found that a gift was intended and made. We believe there was sufficient evidence to sustain the court's finding.

The judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

CONCUR:

HONORABLE JOSEPH H. GOLDENERSH

HONORABLE EDWARD C. EBERSPACHER

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